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Categorical List of Articles

Zoning: Proof of Inverse Condemnation from Excessive Land Use Regulation

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Topic of Article:

Proof that excessive land use and zoning regulations constitute a taking of private property under the just compensation of the Fifth Amendment to the US Constitution or comparable provision of a state constitution.

Successful regulatory takings challenges (also referred to as inverse condemnation) to zoning and land use regulations will essentially depend on proof of facts showing that the regulations (1) fail to substantially advance legitimate governmental interests; or (2) deprive the landowner of economically viable use of his property.

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I. Background

§ 1. Introduction; scope

[Cumulative Supplement]

The main purpose of zoning regulation is to promote orderly community development through various restrictions on location, size and types of land uses. Local zoning authority generally is delegated to municipalities by state enabling legislation. As long as a zoning regulation furthers a legitimate public purpose, is not unduly oppressive to private interests, and is not applied in a discriminatory fashion, it will ordinarily withstand judicial scrutiny. The Courts have long recognized that zoning performs a valid police power function when exercised in conformity with enabling legislation and constitutional rights.

Zoning is an integral part of nearly every American community. Continued population growth and urban development made zoning a virtual necessity to effectively balance public and private property interests.[1] Since the seminal zoning case, Euclid v Ambler Realty Co.,[2] was handed down by the US Supreme Court in 1926, local governments have relied on zoning as a constitutional exercise of the police power to control density problems, traffic flow, infrastructure development, and neighborhood character. Municipal zoning ordinances are generally aimed at furthering orderly development through the use of districting of compatible land uses, promoting aesthetic qualities, and guarding the public health, safety and general welfare.

Zoning by its nature places some limitation on the use of property. Zoning restrictions are generally understood as one of the burdens associated with the benefit of living in an orderly society. Still, a particular zoning regulation must be reasonable and further a legitimate governmental interest to be valid. It can be neither arbitrary in its scope or purpose nor unduly burden one individual at the expense of the public good.[3]

This article will discuss the proof required to show that excessive land use and zoning regulations constitute a taking of private property under the just compensation of the Fifth Amendment to the US Constitution or comparable provision of a state constitution. Successful regulatory takings challenges (also referred to as inverse condemnation) to zoning and land use regulations will essentially depend on proof of facts showing that the regulations (1) fail to substantially advance legitimate governmental interests; or (2) deprive the landowner of economically viable use of his property.

CUMULATIVE SUPPLEMENT

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What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution—Supreme Court Cases, 10 A.L.R. Fed. 2d 231

Trial Strategy

Denial of Wetland Permit as Basis for Landowner's Regulatory Taking Claim, 58 Am. Jur. Proof of Facts 3d 81

Cases:

Proving fact of taking: When the government condemns or physically appropriates property, the fact of a taking is typically obvious and undisputed, but when the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex. U.S.C.A. Const.Amend. 5. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); West's Key Number Digest, Eminent Domain 2(1).

Purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. U.S.C.A. Const. Amend. 5. Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); West's Key Number Digest, Eminent Domain 3.

Just compensation for governmental taking of property differs from equitable restitution and other monetary remedies available in equity, since in determining just compensation question is what has the owner lost, not what has the taker gained, and as its name suggests, just compensation is, like ordinary money damages, a compensatory remedy. U.S.C.A. Const.Amend. 5. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 143 L. Ed. 2d 882 (U.S. 1999); West's Key Number Digest, Eminent Domain 122.

No "physical taking" occurred when the Army Corps of Engineers required developer to set aside 220.85 acres of its property and maintain it as undeveloped wetlands "in perpetuity" as condition for allowing developer to fill and impact other wetlands areas under permit issued pursuant to section of the Clean Water Act; although the Corps placed a permanent restriction on the wetlands mitigation acres, government did not physically occupy or take possession of the acreage. Federal Water Pollution Control Act Amendments of 1972, § 404, as amended, 33 U.S.C.A. § 1344. Norman v. U.S., 63 Fed. Cl. 231, 34 Envtl. L. Rep. 20157 (2004); West's Key Number Digest, Bankruptcy 2.27(2).

No more property of private individual, and no greater interest therein, can be condemned and set apart for public use than is absolutely necessary. Harness v. Arkansas Public Service Com'n, 60 Ark. App. 265, 962 S.W.2d 374 (1998).

Government need not pay even for complete takeover or destruction of property if it is justified by owner's insistence on using property to injure other people or their property. West's C.R.S.A. Const. Art. 2, § 15. Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. Ct. App. 1996), cert. denied, (July 28, 1997).

Neighbor's claim of inadequate regulation: Zoning ordinance that allowed ready mix plant to operate across from property owners' land, which operation allegedly created problems for owners, did not constitute a compensable governmental taking under the Takings Clause. U.S.C.A. Const.Amend. 5; I.C.A. Const. Art. 1, § 18. Harms v. City of Sibley, 702 N.W.2d 91 (Iowa 2005); West's Key Number Digest, Eminent Domain 2.10(6).

Oregon takings initiative: Ballot measure that required government to compensate landowners for reductions of real property fair market value due to land use regulations, or to modify or not apply such regulations, did not result in unconstitutional violation of equal privileges and immunities; although ballot measure applied only to those landowners who acquired their property prior to enactment of the land use regulations that they wished to avoid, it was

the ballot measure itself that created the alleged classes, and, therefore, the ballot measure did not offend principles of equal privileges and immunities. West's Or.Const. Art. 1, § 20; West's Or.Rev. Stat. Ann. § 197.352. MacPherson v. Department of Administrative Services, 340 Or. 117, 130 P.3d 308 (2006); West's Key Number Digest, Constitutional Law 205(2).

Ubiquitous nature of regulatory takings: Physical takings are relatively rare, easily identified, and usually represent a greater affront to individual property rights than regulatory takings, which are ubiquitous, with most of them impacting property values in some tangential way; thus, it is often inappropriate to treat cases involving one type of taking as controlling precedents for the other. U.S.C.A. Const.Amend. 5. Lowenberg v. City of Dallas, 168 S.W.3d 800 (Tex. 2005); West's Key Number Digest, Eminent Domain 2.1.

Tenant's claim based on nonenforcement of regulation: Tenants stated valid takings claim against Department of Labor and Industry by alleging that it failed to enforce housing code until closing apartment building and terminating utility service became necessary; the tenants sought compensation for the Department's role in allowing the nuisance to continue unabated for so long, and they alleged that the Department's choice to enforce the housing code only as a last resort deprived them of all beneficial use of their homes. U.S.C.A. Const.Amend. 5; Const. C. 1, Art. 2. Alger v. Department of Labor & Industry, 917 A.2d 508 (Vt. 2006); West's Key Number Digest, Eminent Domain 2.10(3).

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[END OF SUPPLEMENT]

§ 2. Overview of regulatory takings law

[Cumulative Supplement]

A regulatory taking results when a governmental regulation places such a burdensome restriction on a landowner's use of his property that the government has for all intents and purposes "taken" the landowner's property. The debatable issue is exactly how much the regulation must interfere with private property rights before it is deemed a "taking."[4] The courts have increasingly grappled with this issue and no clear test has emerged. Although the US Supreme Court has decided several land use takings cases since 1978,[5] the general consensus has been that no bright-line test can be followed in the regulatory takings context.[6]

Regulatory takings, just like physical governmental takings, such as condemnation, are governed by either the due process clause of the Fourteenth Amendment or the "taking" clause of the Fifth Amendment to the US Constitution.[7] The Fifth Amendment is held applicable to the states by incorporation into the "due process" clause of the Fourteenth Amendment.[8] Whether the taking is caused by physical interference or regulatory interference with a landowner's property rights, just compensation is required under the Constitution whenever a taking occurs.[9]

Clearly, whenever a government takes a landowner's property for a public purpose pursuant to its power of eminent domain, just compensation is due.[10] However, in the regulatory taking area, possible just compensation is dependent on a court's assessment of individual facts and circumstances. The courts rely on a variety of factors in determining whether a land use regulation has resulted in a taking of property for which just compensation is owed. The only instance where the "taking" is clear-cut is when an actual physical invasion of the landowner's property has occurred. "A permanent physical occupation authorized by government is a taking without regard to the public interests it may serve."[11]

Still, even absent a physical occupation of a landowner's property, an overly intrusive government regulation can have the same effect by destroying the use and enjoyment of private property. For example, a single family zoning regulation aimed at preserving neighborhood character may serve a legitimate public purpose while depriving a landowner of all beneficial use of his property. In such an instance, courts have employed a balancing of interests test focusing on the nature and extent of the benefit derived for the public and the nature and extent of the loss occasioned

on the landowner. Under this type analysis, the courts look to three factors in making a taking determination: (1) the character of the government action;[12] (2) the economic impact of the regulation;[13] and (3) interference with the landowner's reasonable investment-backed expectations.[14] No case requires that each of these factors be met before a taking can be found. They are used as guidelines in deciding whether a taking has occurred.[15]

Landowners have never found it easy to prove a regulatory taking of their property. Even when a regulatory taking was found by the court, the usual remedy was invalidation of the particular regulation.[16] However, in 1987, the US Supreme Court in the landmark case of First English Evangelical Lutheran Church v County of Los Angeles.[17] determined that after a taking is found, the government must pay compensation for the time during which the regulation was in effect even if the regulation is later amended or withdrawn.[18] Although the decision was welcomed by landowners because even temporary regulatory takings of property must be compensated, the decision did little to elucidate when a taking has actually occurred. Thus, the federal and state courts continued to wrestle with the proper test for finding a regulatory taking.

CUMULATIVE SUPPLEMENT

Cases:

Taking jurisprudence and eminent domain laws distinguished: The distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat Takings Clause cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking, and vice versa. For the same reason that the Court does not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, the Supreme Court does not apply its precedent from the physical takings context to regulatory takings claims. U.S.C.A. Const.Amend. 5. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); West's Key Number Digest, Eminent Domain 2(1).

Although physical occupation of a person's property is the paradigmatic taking, the Constitution also guards against certain uncompensated regulatory interferences with a property owner's interest in his property. U.S.C.A. Const.Amends. 5, 14. Franklin Memorial Hosp. v. Harvey,, 575 F.3d 121 (1st Cir. 2009).

Bedrock requirement: In evaluating a takings claim, court first considers whether plaintiff has identified a property interest cognizable under the Fifth Amendment; if plaintiff satisfies the prerequisite of identifying a cognizable property interest, which has been labeled a "bedrock requirement," court proceeds to consider whether the governmental action at issue constituted a taking of that property interest. U.S.C.A. Const.Amend. 5. Leider v. U.S., 301 F.3d 1290 (Fed. Cir. 2002), reh'g and reh'g en banc denied, (Oct. 23, 2002); West's Key Number Digest, Eminent Domain 2(1).

Individual vs general regulation: A Nollan/Dolan taking may arise when the government makes an adjudicative decision to condition the landowner's application for a building permit on an individual parcel, as opposed to a legislative determination of general application; additionally, that individualized condition must require the property owner to dedicate a portion of his or her property to the public. Spinell Homes, Inc. v. Municipality of Anchorage, 78 P.3d 692 (Alaska 2003); West's Key Number Digest, Eminent Domain 2(1.2).

Regulatory takings fall into three categories: first are those involving a physical invasion of property; second are those in which an enactment burdens real property to such an extent that the property has no economically beneficial use; and finally, a regulatory taking arises if the adverse economic impact, the property owner's investment-backed expectations, and the nature of the governmental action reflect the functional equivalent of a traditional taking. U.S.C.A. Const.Amend. 5; West's Ann.Cal. Const. Art. 1, § 19. Small Property Owners of San Francisco v. City and County of San Francisco, 141 Cal. App. 4th 1388, 47 Cal. Rptr. 3d 121 (1st Dist. 2006); West's Key Number Digest, Eminent Domain 2.1.

Notwithstanding the right to privacy set forth in the state constitution, landowners do not have an untrammeled right to use their property regardless of the legitimate environmental interests of the state. But the state acting within its lawful power to regulate property is likewise limited by the depth of its purse, given that property owners are protected by the inverse condemnation provisions of the state constitution. Department of Community Affairs v

Moorman (1995, Fla) 664 So 2d 930.

Only two relatively narrow regulatory actions are deemed to be categorical, facial takings, those involving physical invasion of property, or, those resulting in a total regulatory taking. U.S.C.A. Const.Amend. 5. Shands v. City of Marathon, 999 So. 2d 718 (Fla. Dist. Ct. App. 3d Dist. 2008).

A facial taking, also known as a per se or categorical taking, occurs when the mere enactment of a regulation precludes all development of the property, and deprives the property owner of all reasonable economic use of the property. Collins v. Monroe County, 999 So. 2d 709 (Fla. Dist. Ct. App. 3d Dist. 2008).

Balancing test: Point at which police power becomes so oppressive that it results in a taking, requiring just compensation under State Constitution, is determined on a case-by-case basis; this ad hoc approach applies a balancing test that is essentially one of reasonableness, asking whether the collective benefits of the regulatory action outweigh the restraint imposed upon the property owner, and factors to be considered in applying the test include (1) the economic impact of the regulation on the claimant's property, (2) the regulation's interference with investment-backed expectations, and (3) the character of the governmental action. Iowa Constitution Art 1, § 18. Kelley v. Story County Sheriff, 611 N.W.2d 475 (Iowa 2000); West's Key Number Digest, Eminent Domain 2(1).

In analyzing whether categorical taking has occurred in situation in which owner has not been deprived of all economically beneficial or productive use of land, reviewing court must engage in an ad hoc, factual inquiry, centering on three factors: (1) character of government's action, (2) economic effect of regulation on property, and (3) extent by which regulation has interfered with distinct, investment-backed expectations. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2. K & K Const., Inc. v. Department of Natural Resources, 456 Mich. 570, 575 N.W.2d 531 (1998), petition for cert. filed (U.S. June 3, 1998).

The enterprise test for reviewing whether zoning regulation resulted in a taking is employed when a regulation, to the detriment of private property, benefits a specific governmental enterprise that serves the public; this analysis is triggered only when a specific governmental enterprise takes an effective easement on the property, causing a substantial diminution in market value. M.S.A. Const. Art. 1, § 13. Concept Properties, LLP v. City of Minnetrista, 694 N.W.2d 804 (Minn. Ct. App. 2005), review denied, (July 19, 2005); West's Key Number Digest, Eminent Domain 2.10(5).

Aside from an outright physical invasion, a categorical taking is deemed to have occurred when a regulation or state action forces an owner to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 29. Kafka v. Montana Dept. of Fish, Wildlife and Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (2008).

Coastal council's action forbidding landowner from filling critical tidelands area on his property without permit after hurricane was not regulatory taking requiring compensation where landowner never had right to fill such area. State law forbade his filling critical areas without permit from coastal council at time he bought property; area remained critical immediately after hurricane. Therefore, after hurricane, landowner's right to use his property did not alter from when he originally acquired title to it. Hence, no taking occurred. Grant v South Carolina Coastal Council (1995, SC) 461 SE2d 388.

Takings are classified as either physical or regulatory; "physical takings" occur when the government authorizes an unwarranted physical occupation of an individual's property, and a compensable "regulatory taking" occurs when a governmental agency imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interferes with the owner's right to use and enjoy the property. Vernon's Ann.Texas Const. Art. 1, § 17. City of El Paso v. Maddox, 276 S.W.3d 66 (Tex. App. El Paso 2008), reh'g overruled, (Oct. 29, 2008) and petition for review filed, (Jan. 12, 2009).

To raise a valid regulatory takings claim a party must show that a regulation (1) compels the owner to suffer a physical invasion of its property, (2) destroys all economically viable use of the property, or (3) unreasonably interferes with the use and enjoyment of the property. TCI West End, Inc. v. City of Dallas, 274 S.W.3d 913 (Tex. App. Dallas 2008), reh'g overruled, (Jan. 30, 2009).

Under threshold inquiry used to determine whether regulation constitutes taking under Fifth Amendment, court first asks whether regulation destroys or derogates any fundamental attribute of property ownership, including right to possess, exclude others, dispose of property and make some economically viable use of property; claims alleging physical invasion or total taking are analyzed under this part of threshold inquiry. U.S.C.A. Const.Amend. 5. Schreiner Farms, Inc. v. Smitch, 87 Wash. App. 27, 940 P.2d 274 (Div. 3 1997).

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§ 3. Exhaustion of administrative remedies

[Cumulative Supplement]

Before a landowner may challenge a zoning or land use regulation on regulatory takings grounds, he must first exhaust available administrative remedies and, unless mounting a facial challenge, must have obtained a final decision regarding proposed use of the property. These two requirements together make up the "ripeness" doctrine in takings litigation.

The Court in Williamson County Regional Planning Com. v Hamilton Bank of Johnson City[19] explained finality and exhaustion as they relate to taking claims: The question whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the concepts often overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. [20]

Finality in the underlying proceedings must be established in order to determine how much the owner's use of the property has been impaired, and therefore "taken" by the governmental action. For example, resort to procedures for obtaining variances would result in a conclusive determination whether a landowner would be allowed to develop his property in the manner proposed.

In takings challenges, the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations are important factors.[21] However, those factors cannot be evaluated effectively until an administrative agency has arrived at a final, determinative position regarding how it will apply the regulations at issue to the particular land in question.[22]

To demonstrate the requisite finality, a property owner asserting a regulatory takings claim bears the burden of proving that the relevant government entity will not allow any reasonable alternative use of his property.[23]

The Supreme Court in Williamson County held that the owner had not only failed to show finality, it also failed to show the necessary exhaustion of State remedies because it had not pursued the inverse condemnation procedures available under Tennessee law. If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.[24] The reason for an exhaustion requirement in taking cases is that the fifth amendment prohibits taking without "just compensation," and no constitutional violation occurs until just compensation has been denied by state proceedings. A plaintiff seeking compensation under a taking theory has the burden of establishing that State remedies are inadequate and, unless a claim is ripe for adjudication, a court has no jurisdiction to hear it.[25] Many states have procedures for obtaining just compensation.[26]

However, even when a state has no statutory procedure for obtaining just compensation, a property owner may be precluded from seeking just compensation in federal court where the state courts recognize inverse condemnation claims as a matter of common law.[27] But, if state common law expressly rejects the particular type of inverse condemnation claim raised, a property owner may not have to resort to futile state court litigation.[28]

If a property owner brings his taking claim in state court and the state court holds there has been no taking, res judicata may bar a subsequent action under the Fifth Amendment in federal court unless the property owner "reserves" his right to a hearing in federal court.[29] Otherwise, a property owner's ability to seek certiorari in the US Supreme Court may be the only avenue of obtaining a federal court hearing in cases involving regulatory takings by state governmental entities where state law recognizes an action for just compensation.

The ripeness requirements put the landowner in the uncomfortable position of deciding whether to: (1) apply for a permit and have it denied;[30] (2) apply for a variance; (3) submit additional applications for other, less intensive uses of the property that the regulatory authority might find acceptable;[31] (4) obtain a final determination from the regulatory authority as to what use of the property would be permitted? [32]

In most regulatory permitting systems, before the owner can claim that a regulatory restriction has taken his property, the owner normally must apply for a permit.[33] If it would be futile to seek a permit, however, that requirement may not be applicable,[34] and a taking may be found at the time the regulatory provision became effective.[35]

Exhaustion of administrative remedies is generally required before resort to the courts, although exhaustion is excused if a resort to administrative procedures would be futile.[36] Once exhaustion is raised as a defense, the landowner seeking to establish "futility" as an exception to the exhaustion requirement must persuade the court that futility excuses exhaustion.[37] This is a substantial burden because of the strong public policies favoring the exhaustion doctrine.[38]

CUMULATIVE SUPPLEMENT

Cases:

Landowner's § 1983 free speech, equal protection and procedural due process claims alleging that county imposed unreasonable requirements for issuance of residential building permit and delayed polo-field application for nine years in retaliation for landowner's public criticism of county were not "as applied" takings claims, and thus not subject to traditional ripeness analysis for such claims that would have required final agency decisions on permit and application; constitutional claims alleged injury independent of denial of permit and application and were based on egregious alleged facts including demand that landowner pay fees to cover cost of investigating baseless zoning violations. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983. Carpinteria Valley Farms, Ltd. v. County of Santa Barbara, 344 F.3d 822, 33 Envtl. L. Rep. 20272 (9th Cir. 2003); West's Key Number Digest, Constitutional Law 46(1).

A ripeness test applies to substantive due process claims alleging a local planning authority's prevention of the development of land, and thus, before a federal court may step in, it must allow the local authority a chance to take final action. U.S.C.A. Const.Amend. 5. Signature Properties Intern. Ltd. Partnership v. City of Edmond, 310 F.3d 1258 (10th Cir. 2002); West's Key Number Digest, Zoning and Planning 562.

Wetlands owner's regulatory "takings" claim arising from United States Army Corps of Engineers' denial of owner's application for construction of levee and canal, which were to be part of development project, became "ripe" at time of denial, for purposes of applicable six-year statute of limitations; at that point there had been denial of economically viable use of property as result of permit denial, owner had distinct investment-backed expectations, and property interest taken was vested in owner as matter of state law, and arguably was not subject to regulation on basis of common law nuisance principles. U.S.C.A. Const. Art. 3, § 2, cl. 1; Amend. 5; 28 U.S.C.A. § 2501. Bayou Des Familles Development Corp. v. U.S., 130 F.3d 1034 (Fed. Cir. 1997).

The denial of a variance did not establish the futility of further attempts by the landowner to obtain a city permit for economic use of his property, so as to satisfy the ripeness requirements for bringing an inverse condemnation action, where the inverse condemnation action sought to establish a taking of the property based on its classification as successional forest under the city's comprehensive plan, but the landowner's variance application did not include a required development plan or address the 3 ordinance criteria for a variance, and, therefore, could not constitute a

"meaningful" application. McKee v City of Tallahassee (1995, Fla App D1) 664 So 2d 333.

The claims of the owners of submerged lands that the city's regulation of their property constituted an unconstitutional regulatory taking were not ripe for review, where permission granted to one landowner to build a viewing dock on the land could not be viewed as a concession that only a dock could be built, additional permits would be required from city and state agencies to fill the land to build a residence contemplated by the owner and the second owner had not made a meaningful application regarding the use of her land, so that it was not clear what the city would or would not approve if requested. City of Riviera Beach v Taylor (1995, Fla App D4) 659 So 2d 1174.

Landowners did not exhaust their administrative remedies, and thus, landowners' inverse condemnation claim, alleging that city's adoption of zoning ordinance reclassifying the landowners' properties from heavy industrial to planned unit development (PUD) was an improper taking, was not ripe for adjudication; landowners never sought relief from the ordinance through the zoning administrator or the board of adjustment, and thus, city never had the opportunity to make final and reviewable decision regarding the uses of the landowners' properties that the city would actually allow with the ordinance in effect. Molo Oil Co. v. The City Of Dubuque, 692 N.W.2d 686 (Iowa 2005); West's Key Number Digest, Eminent Domain 277.

Homeowners' claim that township's imposition of more costly flood-resistant building code requirements on their reconstruction of their home after it was damaged by floods constituted a regulatory taking of their property was not ripe for adjudication, as homeowners failed to seek alternative relief from Construction Board of Appeals (CBA) in form of variances regarding the alleged economically impracticable code provisions requiring flood-resistant repair and reconstruction, and homeowners were not excused from rule of finality, in that they did not demonstrate that appeal to CBA would have been futile. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2; M.C.L.A. § 125.1515(1). Cummins v. Robinson Twp., 283 Mich. App. 677, 770 N.W.2d 421 (2009).

Landowners failed to show that it would be futile to apply to board of adjustment for variance to use their property as mobile home park, and thus, their inverse condemnation action was not ripe for review where they neither sought nor received final decision on application of flood plain management regulations to their property; it was undisputed that county had not arrived at definite position on landowners' application to use property as mobile home park or residential recreation district. U.S.C.A. Const.Amend. 5; Neb.Rev.St. § 23-168.03. Bonge v. County of Madison, 253 Neb. 903, 1998 WL 47629 (1998).

Claim in which property owner alleged that amendments to city zoning resolution and zoning map that changed zoning for area within historic district effected unlawful taking of its property within affected area was not ripe for review when owner had not yet sought variance under amended regulations and did not show that seeking variance would be futile. U.S.C.A. Const.Amend. 5; McKinney's Const. Art. 1, § 7. Peck Slip Associates, L.L.C. v. City Council of City of New York, 6 Misc. 3d 510, 789 N.Y.S.2d 806 (Sup 2004); West's Key Number Digest, Eminent Domain 277.

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[END OF SUPPLEMENT]

§ 3.5. Exhaustion of state judicial remedies

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Federal vs state takings claims: Litigants who pursue inverse condemnation actions in state court in order to comply with *Williamson County Regional Planning Commission v. Hamilton Bank,* which provides that a property owner may not bring a Fifth Amendment takings claim without first having unsuccessfully pursued a state-law takings claim, may reserve their federal takings claims for later resolution in federal court, making clear to the state court and

adverse parties that they intend to bring a federal takings claim in federal court once the litigation of the state-law claim has been completed. U.S.C.A. Const.Amend. 5. Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118, 56 Env't. Rep. Cas. (BNA) 2089 (2d Cir. 2003); West's Key Number Digest, Eminent Domain 277.

Property owner who claimed that he was denied beneficial use of his property without just compensation was not required to pursue state inverse condemnation claim before filing 42 USCA § 1983 claim for just compensation in federal court, where at time of accrual of claim, inverse condemnation claim was not available in state. Daugherty v Sarasota County (1994, MD Fla) 157 FRD 542.

A claim that property has been taken without just compensation is not ripe until initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury, and until injured party has exhausted administrative and judicial procedures by which party may seek review of adverse decision and obtain remedy if decision is found unlawful or otherwise inappropriate. U.S.C.A. Const.Amends 5, 14. Watson Const. Co. Inc. v. City of Gainesville, 433 F. Supp. 2d 1269 (N.D. Fla. 2006); West's Key Number Digest, Eminent Domain 277.

Landowners' claim under § 1983 against redevelopment authority, alleging that identification of their property within urban renewal plan and subject to authority's rights of eminent domain constituted taking without just compensation, is dismissed, because state law provides means by which plaintiffs may seek redress for alleged deprivation of property and landowners' failure to invoke this remedy precludes them from bringing § 1983 action since no constitutional violation occurs until just compensation has been denied. Marietta Realty v Springfield Redevelopment Auth. (1995, DC Mass) 902 F Supp 310.

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[END OF SUPPLEMENT]

§ 4. Parcel as whole analysis

[Cumulative Supplement]

In determining whether government regulation effects a taking of property, a reviewing court must first determine which property should be considered in measuring the severity of the government's action. In Penn Cent. Transp. Co. v New York City,[39] the Supreme Court stated that "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Instead, the court stated that it considers the nature and extent of the government's "interference with rights in the parcel as a whole." Thus, in determining whether New York City's landmark designation law effected a taking of valuable air rights, the court considered the city tax block designated as the landmark site rather than just the developable air space above Grand Central Terminal that the landowners alleged was being taken.[40]

Neither state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a piece of it has been taken with regard to a piece of regulated property. Rather, the courts have consistently viewed a parcel of regulated property in its entirety.[41]

CUMULATIVE SUPPLEMENT

Cases:

Four takings theories: A plaintiff seeking to challenge a government action as an uncompensated taking of private property may proceed under one of four theories by alleging: (1) a physical invasion of property, (2) that a regulation completely deprives a plaintiff of all economically beneficial use of property, (3) a general regulatory takings challenge pursuant to *Penn Central*, or (4) a land-use exaction violating the standards set forth in *Nollan* and *Dolan*McClung v. City of Sumner, 545 F.3d 803 (9th Cir. 2008), opinion amended and superseded on denial of reh'g, 2008 WL 5049647 (9th Cir. 2008); West's Key Number Digest, Eminent Domain 2.10(7).

Even if regulatory taking is not of the entire parcel as a whole either temporally or by its metes and bounds,

government regulation can still effect a "partial taking," for which just compensation must be paid, pursuant to fact-intensive balancing test of *Penn Central*, which requires court to weigh: (1) the economic impact of regulation on claimant; (2) the extent to which regulation has interfered with claimant's distinct investment-backed expectations; and (3) character of governmental action. U.S.C.A. Const.Amend. 5. Resource Investments, Inc. v. U.S., 85 Fed. Cl. 447 (2009).

In determining the economic ramifications of a regulatory act, a court must look at the contiguous parcel of land owned by the petitioner, not merely the portion most drastically affected by the regulation. West's C.R.S.A. Const. Art. 2, § 15. Animas Valley Sand and Gravel, Inc. v. Board of County Com'rs of County of La Plata, 38 P.3d 59 (Colo. 2001); West's Key Number Digest, Eminent Domain ⚷2(1).

Application of a wetlands protection bylaw to prohibit property owner's construction of a house on one of two contiguous lots did not constitute a regulatory taking under the Fifth Amendment to the United States Constitution; although owner could not build house on lot containing a wetland, owner built home on second lot and sold it for more than he paid to purchase both lots, owner did not invest any money that relied on the separate development of lot containing wetland, bylaw resulted in decrease of only twenty-nine per cent of value of the two lots, and limitation on use was not like a physical invasion and did not unfairly single out owner. U.S.C.A. Const.Amend. 5. Giovanella v. Conservation Com'n of Ashland, 447 Mass. 720, 857 N.E.2d 451 (2006); West's Key Number Digest, Eminent Domain ⚷2.27(2).

Owner of two contiguous lots, one of which contained a wetland, failed to overcome presumption that contiguous commonly-owned property was the relevant parcel for purposes of regulatory takings claim arising out of application of a wetlands protection bylaw to prohibit owner's construction of house on one of the two lots; lots were purchased at the same time as part of one transaction, lots were not separately financed, lots were not separated by a road, and owner failed to show he treated lots as separate economic units. U.S.C.A. Const.Amend. 5. Giovanella v. Conservation Com'n of Ashland, 447 Mass. 720, 857 N.E.2d 451 (2006); West's Key Number Digest, Eminent Domain ⚷295.

In assessing the "economic impact" factor of regulatory takings analysis, the court will look at the magnitude of the impact on the parcel as a whole. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 29. Kafka v. Montana Dept. of Fish, Wildlife and Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (2008).

Landowner's parcel as a whole, rather than landowner's sand and gravel interests, was relevant parcel for purposes of landowner's claim that county board of zoning appeals's denial of landowner's application for conditional-use permit to mine sand and gravel on land constituted a compensable regulatory taking, and thus, given that landowner was not deprived of all economically viable use of its land, a compensable categorical taking did not occur, where deed transferred fee simple title to landowner; there was no evidence that a mineral estate was created. U.S.C.A. Const.Amends. 5, 14. State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs., 115 Ohio St. 3d 337, 2007-Ohio-5022, 875 N.E.2d 59 (2007); West's Key Number Digest, Eminent Domain ⚷2.10(6).

Logging rights was but one stick in property rights bundle: No per se regulatory taking occurred with respect to Board of Forestry's refusal to permit landowner to conduct logging operations on property on which a spotted owl nesting site had been located, as landowner did not plead or prove that Board's regulation denied it use of the entire parcel of land, landowner sought compensation only for deprivation of one "stick" in bundle of rights it held in land, and, thus, the timber was not a property interest separate from the rest of the relevant parcel that could support an independent claim for a per se regulatory taking, and landowner did not plead or prove that it had been permanently deprived of all economic value of land. U.S.C.A. Const.Amend. 5. Boise Cascade Corp. v. State ex rel. Bd. of Forestry, 216 Or. App. 338, 174 P.3d 587 (2007), review denied, 344 Or. 390, 181 P.3d 769 (2008) and petition for cert. filed, 77 U.S.L.W. 3009, 77 U.S.L.W. 3023 (U.S. June 24, 2008); West's Key Number Digest, Eminent Domain ⚷2.27(1).

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[END OF SUPPLEMENT]

§ 5. Regulation must substantially advance legitimate governmental interests

[Cumulative Supplement]

The "taking" analysis requires that the court first ask whether the regulation substantially advances legitimate state interests. If it does not, then it constitutes a "taking."[42] If it does substantially advance a legitimate state interest, then it becomes necessary to look further and see if the challenge to the regulation is a facial challenge or one involving application of the regulation to specific property. It is not necessary for landowners to exhaust administrative remedies in a facial challenge because the allegation would be that application of the regulation to any property would constitute a "taking."[43] If the case is a facial challenge, then the landowner must show that the regulation denies all economically viable use of any parcel of regulated property in order to constitute a taking.[44] Practically, however, this a relatively rare occurrence. In pursuing this inquiry, however, it first becomes necessary to determine exactly what property it is that the court is to consider.[45]

If the challenge involves an application of the regulation to specific property, then the court should consider: (1) the economic impact of the regulation on the property;[46] (2) the extent of the regulation's interference with investment-backed expectations;[47] and (3) the character of the government action.[48]

If the court determines a "taking" has, in fact, occurred, then just compensation is mandated by the Fifth and Fourteenth Amendments and by Const art 1, § 16.[49] If the taking was due to an overly severe land use regulation, and was temporary and reversible, the governmental unit involved has the option of curing the taking or maintaining the status quo by exercising its eminent domain power. Whichever it chooses, just compensation must be paid for the period during which the taking is effective.[50]

Rent control ordinances have been upheld against taking challenges as a substantial means of advancing governmental interests in preserving affordable housing.[51] Historic preservation and architectural review ordinances, and other aesthetic controls may substantially advance legitimate governmental interests.[52] Large lot zoning restrictions and agricultural districts may substantially advance governmental interests in preserving open space, farmland, and environmentally sensitive areas.[53] Likewise, restrictions on subsurface mining activities may advance legitimate governmental concerns about groundwater pollution and adverse environmental impacts on the topography of an area.[54] If some viable use remains, land use regulations aimed at protecting the environment, open space, or historic structures will generally pass constitutional muster under the takings clause of the federal or state constitution.[55] Until recently, regulations enacted to protect public health and safety were generally insulated from takings challenges even when the regulation deprived the landowner of all economically viable and beneficial use of the property. This "noxious use" exception to takings law has, however, been severely limited by the 1992 US Supreme Court decision in Lucas v South Carolina Coastal Council.[56]

CUMULATIVE SUPPLEMENT

Cases:

Enforcement of city ordinance regulating adult entertainment business that prohibited private modeling sessions between customers and employees against owners of one-on-one lingerie modeling studio was not a taking as owners had no vested right to offer one-on-one modeling absent license specifically permitting such modeling or other conduct prohibited by ordinance; even though operators may suffer economic injury in complying with ordinance, they were free to do business in accordance with licenses they had been granted, and ordinance did not eliminate the business, only regulated it by imposing manner restriction on how it could operate under adult entertainment licenses. U.S.C.A. Const.Amend. 14; City of Columbus, Ga., Ordinance No. 96-21. Quetgles v. City of Columbus, 491 S.E.2d 778 (Ga. 1997).

Exclusion of quarrying from district was substantially related to the health, safety and general welfare of the community, and thus zoning ordinance prohibiting quarrying was not an unconstitutional "taking" of landowner's property, where surface mining would entail the use of explosives, heavy trucks, and other equipment, would increase dust, noise, air pollution, truck traffic and damage to homes from blasting, and would have other negative effects on the quality of life, including an adverse effect on the aesthetics of the community and a further diminution of property

values. Centre Lime and Stone Co., Inc. v. Spring Township Bd. of Supervisors, 787 A.2d 1105 (Pa. Commw. Ct. 2001), appeal denied, 568 Pa. 740, 798 A.2d 1291 (2002); West's Key Number Digest, Eminent Domain ⚿2(7).

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[END OF SUPPLEMENT]

§ 6. Regulation must not deprive owner of economically viable use

[Cumulative Supplement]

In order to resolve the question whether the landowner has been denied all or substantially all economically viable use of his property, the court must analyze, at the very least: (1) the economic impact of the regulation on the claimant; and (2) the extent to which the regulation has interfered with investment-backed expectations.[57] This analysis must be explored in light of developing case law that has shaped and defined the meaning of these factors.[58]

Permit denials can give rise to successful takings claims if the property cannot be put to any other economically viable use absent the permit.[59] However, merely because a permit for one proposed use is denied does not necessarily mean that a proposal for a less ambitious project would be denied. The landowner bears the burden of proving that no other economically feasible use could be put to the property.[60]

In the case of a rezoning or variance application, where the owner purchases land zoned in one classification with the intent or expectation of obtaining a change in zoning and is unsuccessful, nothing may have been "taken" from him.[61] The status quo has simply been maintained. The landowner's bundle of property rights is as originally purchased. However, in cases involving permit regulations, the land is purchased with future development legitimately anticipated and with no existing bar thereto.[62] However, even a denial may not prevent all economically viable use of the land, thus a taking does not occur automatically with every denial.[63] Generally, the denial will not render the land useless in the economic sense. Although development of one segment of rights or uses of the property has been precluded, other uses may continue to exist. If so, no taking has occurred.[64]

CUMULATIVE SUPPLEMENT

Cases:

Regulation which precluded use of fill on wetlands and thus development of beach club on wetlands portion of 18-acre tract, but which permitted landowner to build substantial residence on uplands portion of tract, leaving parcel with $200,000 in development value, did not deprive landowner of all economic use of entire parcel so as to support *Lucas* takings claim. U.S.C.A. Const. Amend. 5. Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); West's Key Number Digest, Eminent Domain ⚿2(10).

Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. U.S.C.A. Const. Amend. 5. Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); West's Key Number Digest, Eminent Domain ⚿2(1.2).

Two categories of regulatory action generally will be deemed per se takings: first, where the government requires an owner to suffer a permanent physical invasion of her property, it must provide just compensation, and second, per se regulatory takings occur where the regulations completely deprive an owner of all economically beneficial use of her property. U.S.C.A. Const.Amends. 5, 14. Franklin Memorial Hosp. v. Harvey,, 575 F.3d 121 (1st Cir. 2009).

The ad hoc analysis used to determine whether a regulatory taking occurred requires the court to balance: (1) the extent to which the regulation has interfered with reasonable investment-backed expectations; (2) the economic impact of the regulation on the claimant; and (3) the character of the governmental action at issue. U.S.C.A.

Const.Amend. 5. Norman v. U.S., 429 F.3d 1081 (Fed. Cir. 2005); West's Key Number Digest, Eminent Domain ⚷2.1.

Categorical taking: A regulatory taking may deny all economically beneficial or productive use of land, and thus constitute a "categorical taking," or may have crossed the line from a noncompensable mere diminution to a compensable partial taking. U.S.C.A. Const.Amend. 5. McKay v. U.S., 199 F.3d 1376 (Fed. Cir. 1999); West's Key Number Digest, Eminent Domain ⚷2(1).

Under Oregon law, a regulatory taking occurs only when a property owner is deprived of all beneficial use of its property by the government's allegedly unlawful actions. David Hill Development, LLC v. City of Forest Grove, 688 F. Supp. 2d 1193 (D. Or. 2010).

"Urgency" ordinance requiring one parking space for every 150 feet of floor space for court-related uses did not effect "taking" of property of debtor who had built office shell with one parking space for every 275 feet of floor space, and who was bargaining to rent shell to county for courtroom uses when ordinance was passed, where ordinance did not affect debtor's rights under his conditional-use permit to use property for any hi-tech offices and high-end industrial/commercial space. Any courtroom-related use simply required debtor to add more parking area or to lease space from neighboring property owners. Since ordinance substantially advanced legitimate state interests without depriving owner of all economically viable uses of land, there was no Fifth Amendment taking. Conrow v City of Torrance (In re Park Beyond the Park) (1993, BAP9 Cal) 157 BR 887, 93 CDOS 6924, 93 Daily Journal DAR 11771, affd (CA9) 52 F3d 334.

Where the property at issue in a regulatory taking has not been deprived of all economically viable uses, the court will conduct an essentially ad hoc, factual inquiry focused on three factors: (1) the character of the governmental action, (2) the degree of interference with the reasonable, investment-backed expectations of the property owner, (3) the economic impact of the action, and, for regulatory takings claims of a temporary nature, (4) the duration of the restriction. U.S.C.A. Const.Amend. 5. CCA Associates v. U.S., 91 Fed. Cl. 580 (2010).

In deciding whether a regulation that does not deprive property owner of all economically viable use if his land nonetheless effects a temporary, partial taking under the *Penn Central* test, court must assess whether regulation went "too far" by balancing (1) the economic impact of regulation on claimant and (2) extent to which regulation has interfered with his distinct investment-backed expectations against (3) character of governmental action. Resource Investments, Inc. v. U.S., 85 Fed. Cl. 447 (2009).

Government water use restrictions imposed pursuant to the Endangered Species Act effected a physical, rather than regulatory, taking of property in the case of water users who had contract rights entitling them to the use of a specified quantity of water; by preventing users from using the water to which they would otherwise have been entitled, the government rendered the usufructuary right to that water valueless, effecting a complete occupation of property. U.S.C.A. Const. Amend. 5; Endangered Species Act of 1973, § 2 Am. Jur., as amended, 16 U.S.C.A. § 1531. Tulare Lake Basin Water Storage Dist. v. U.S., 49 Fed. Cl. 313 (2001); West's Key Number Digest, Eminent Domain ⚷2(10).

Environmental Species Act (ESA) did not require that property containing endangered species be maintained in its natural state and thus did not deprive property of all economic value so as to support federal takings claim for denial of federal permits for proposed residential development on property, in light of possibility that ESA exemptions could apply to allow taking of individual endangered rabbits and in light of fact that taking of individual rabbits on property would not legally require finding that continued existence of species would be jeopardized by development. Endangered Species Act of 1973, §§ 3(19), 7(b)(4), (o), 9(a)(1)(B), 10(a), 16 U.S.C.A. §§ 1532(19), 1536(b)(4), (o), 1538(a)(1)(B), 1539(a). Good v. U.S., 39 Fed. Cl. 81 (1997).

Notice defense: Government was not protected by "notice defense" from development company's takings claim arising from Army Corps of Engineers' denial of Clean Water Act (CWA) dredge and fill permit to fill in wetlands that were company's lakebottom property, even though CWA permit regulatory structure was in place prior to developer's acquisition of lakebottom property, as permit-based regulatory system could not support argument that existence of regulatory regime could deny property owner the requisite compensable property interest. U.S.C.A. Const.Amend. 5; Federal Water Pollution Control Act Amendments of 1972, § 404, 33 U.S.C.A. § 1344. Forest Properties, Inc. v. U.S., Big Bear Municipal Water District, 39 Fed. Cl. 56 (1997).

Amendment to city zoning ordinance that precluded concrete manufacturer from operating concrete batch plant on one of its properties was not unconstitutional "taking;" manufacturer's inability to operate concrete batch plant at site did not destroy major portion of property's value since manufacturer retained option of batching concrete at

another site and transporting it to site subject to the ordinance, as it had in the past. U.S.C.A. Const.Amends. 5, 14; Const. Art. 1, § 4; Slidell, La., Zoning Code § 2.20. Standard Materials, Inc. v. City of Slidell, 700 So. 2d 975 (La. Ct. App. 1st Cir. 1997).

Denial of variance for construction of swimming pool in critical areas buffer did not amount to a constitutionally-cognizable taking; landowners would continue to enjoy their primary residence on subject property, use would be further enhanced with the addition of decking, retaining wall, and patio authorized by unchallenged parts of variance, and addition of swimming pool would be an amenity. U.S.C.A. Const.Amend. 5. White v. North, 121 Md. App. 196, 708 A.2d 1093 (1998).

Landowner failed to establish that the township zoning ordinance, rezoning his property from light industrial to residential multiple, amounted to either a de facto or a regulatory taking of his property; although landowner's argument rested on alleged reduction in the value of his property due to its rezoning to residential use, municipality was not required to zone property for its most profitable use and mere diminution in value did not amount to a taking, landowner's property was suitable for residential development, and landowner did not have a constitutionally protected right to develop his property under light industrial zoning classification. Dorman v. Township of Clinton, 269 Mich. App. 638, 714 N.W.2d 350 (2006); West's Key Number Digest, Eminent Domain 2.10(6).

Construction of permanent pedestrian barricade designed as traffic control device to block pedestrian traffic across city street did not deprive building owner with ground floor retail space adjacent to affected public sidewalk of all economically viable use of property or constitute de facto taking of property that would be compensable under Eminent Domain Procedure Law, despite owner's claims that barricade would render property essentially unusable for retail operations, would arbitrarily block or render nearly useless fire exit from property, and would impose on owner cost of reconfiguring fire exits. McKinney's EDPL § 104. 475 Ninth Ave. Associates LLC v. Bloomberg, 2 Misc. 3d 597, 773 N.Y.S.2d 790 (Sup 2003); West's Key Number Digest, Bankruptcy 2(6).

The following three factors must be examined in determining whether a regulatory taking occurred in cases in which there is no physical invasion, and the regulation deprives the property of less than 100 percent of its economically viable use: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. U.S.C.A. Const.Amends. 5, 14. State ex rel. Shelly Materials, Inc. v. Clark Cty. Bd. of Commrs., 115 Ohio St. 3d 337, 2007-Ohio-5022, 875 N.E.2d 59 (2007); West's Key Number Digest, Eminent Domain 2.1.

A landowner is not required to prove that he or she has been deprived of all beneficial use of his or her property; to establish a de facto taking, the landowner must establish that there were exceptional circumstances which substantially deprived the property owner of the beneficial use and enjoyment of his or her property. Miller & Son Paving v Plumstead Twp. (1996, Pa Cmwlth) 680 A2d 5.

Reasonableness analysis: If the effect of a zoning law is to deprive landowners of the lawful use of their property, it amounts to a "taking" for which the owners must be justly compensated; however, because all zoning involves a "taking" in the sense that landowners are not completely free to use their property as they choose, such a "taking" does not entitle the landowners to relief unless the owners' rights have been unreasonably restricted. Centre Lime and Stone Co., Inc. v. Spring Township Bd. of Supervisors, 787 A.2d 1105 (Pa. Commw. Ct. 2001), appeal denied, 568 Pa. 740, 798 A.2d 1291 (2002); West's Key Number Digest, Eminent Domain 2(1.2).

A "compensable regulatory taking" can occur when a governmental entity imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interfere with the owner's right to use and enjoy the property. U.S.C.A. Const.Amend. 5; Vernon's Ann.Texas Const. Art. 1, § 17. City of Carrollton v. RIHR Inc., 308 S.W.3d 444 (Tex. App. Dallas 2010), reh'g overruled, (Apr. 26, 2010).

A taking may be either physical or regulatory; a "physical taking" occurs when the government authorizes an unwarranted physical occupation or appropriation of an individual's property, and a compensable "regulatory taking" occurs if governmental regulations deprive a property owner of all economically viable use of his property or if those regulations totally destroy the property's value. Kahn v. Imperial Airport, L.P., 308 S.W.3d 432 (Tex. App. Dallas 2010).

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[END OF SUPPLEMENT]

§ 7. Regulation must not deprive owner of economically viable use—Economic impact on landowner

[Cumulative Supplement]

Proof of facts showing adverse economic impact of zoning and land use regulations on a landowner may support a showing that an economically viable use of the property has been taken. For plaintiffs to prevail, the result of a comparison of the fair market value before the government action and that value after the government action must indicate more than a mere diminution in value, because "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[65] A substantial reduction in value, however, in and of itself is not necessarily a sufficient basis for concluding that a taking has occurred. The Court in Penn Central indicated that the proper focus must be on remaining uses of the property in light of the regulatory action, rather than on the diminution in value.[66] Likewise, an inability to use the property for production of an income stream or to make the highest and best use does not render the property without economically viable use.[67] However, where the diminution in value is substantial this factor may weigh in favor of the landowner.[68]

CUMULATIVE SUPPLEMENT

Cases:

Landowners's claim that city's legislative, generally applicable development condition in ordinance requiring all new developments to install minimum of 12-inch storm pipe, but that did not require landowners to relinquish rights in real property, as opposed to adjudicative land-use exaction, warranted application of ad hoc taking standards of *Penn Central*, for determination of Fifth Amendment violation, rather than nexus and proportionality standards of *Nollan/Dolan* framework. U.S.C.A. Const.Amend. 5. McClung v. City of Sumner, 545 F.3d 803 (9th Cir. 2008), opinion amended and superseded on denial of reh'g, 2008 WL 5049647 (9th Cir. 2008); West's Key Number Digest, Eminent Domain 2.10(7).

5% of property affected: Zoning ordinance imposing use restrictions on land located near airport, as applied to 1.25 acres of landowners' property designated as within runway protection zone (RPZ), did not effect a "taking" under Nevada Constitution, where (1) the economic impact on landowners was minimal because the property in the RPZ accounted for only 5% of landowners' property, and that small portion could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot, (2) interference with reasonable investment-backed expectations was also minimal because the regulation furthered an important public policy of airline safety and because the initial development of the airport predated the acquisition of the subject property, and (3) the character of the government action favored the county because airport zoning benefited the public as a whole. West's NRSA Const. Art. 1, § 8(6). Vacation Village, Inc. v. Clark County, Nev, 497 F.3d 902 (9th Cir. 2007); West's Key Number Digest, Eminent Domain 2.10(6).

Permitted use of land is "economically viable", so as to preclude finding of regulatory takings based on deprivation of all economically viable use of land, when sufficient number of people would be willing to buy property for that use, whatever it might be, to make property commercially marketable; fact that permitted use might not be one to which current owner wanted to put property does not matter. U.S.C.A. Const.Amend. 5. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999); West's Key Number Digest, Eminent Domain 2(1).

With regard to economic impact factor of regulatory taking test, proper measure of economic impact is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action. Cane Tennessee, Inc. v. U.S., 57 Fed. Cl. 115, 56 Env't. Rep. Cas. (BNA) 2144 (2003); West's Key Number Digest, Eminent Domain 2(1).

The focus of the "economic impact" factor of regulatory takings analysis is on the change in the fair market value of the subject property caused by the regulatory imposition; thus, the court must compare the value that has been taken from the property with the value that remains in the property. U.S.C.A. Const. Amend. 5. Walcek v. U.S., 49 Fed. Cl.

248 (2001); West's Key Number Digest, Eminent Domain 2(1).

Denial of a wetlands fill permit under the Clean Water Act (CWA) was a categorical taking, where at least 98.8% of the property's value was destroyed by the denial. U.S.C.A. Const.Amend. 5; Federal Water Pollution Control Act Amendments of 1972, § 404, as amended, 33 U.S.C.A. § 1344. Cooley v. U.S., 46 Fed. Cl. 538 (2000); West's Key Number Digest, Eminent Domain 2(10).

Shopping center lost one of four entrances: Closing of one entrance to shopping center by Department of Transportation (DOT) as part of an intersection improvement project did not result in a substantial diminution of access, and thus, closing did not amount to an inverse condemnation such that shopping center owners were entitled to compensation for a taking, where center retained four other entrances, including the main entrance, and even gained an additional egress option for its customers. State, Dept. of Transp. v. Suit City of Aventura, 774 So. 2d 9 (Fla. Dist. Ct. App. 3d Dist. 2000); West's Key Number Digest, Eminent Domain 106.

Trial court considering property owner's regulatory takings claim erred in determining that property owner did not have reasonable investment-backed expectation of building home on 17,490 square foot lot due to existence of zoning law limiting new home construction to 30,000 square foot lots, where a person in owner's situation could reasonably rely on his ability to build on the undersized lot based on its similarity to the surrounding lots on which homes had already been built, or based on the availability of special permits for preexisting nonconforming lots. U.S.C.A. Const.Amend. 5. Giovanella v. Conservation Com'n of Ashland, 447 Mass. 720, 857 N.E.2d 451 (2006); West's Key Number Digest, Eminent Domain 2.10(6).

Apart from two narrow categories of regulatory action that generally will be deemed taking per se for Fifth Amendment purposes, i.e., when the government requires an owner to suffer a permanent physical invasion of the owner's property or government regulations completely deprive an owner of all economically beneficial use of the property, regulatory takings challenges are governed by a balancing test that requires court to engage in an ad hoc, factual inquiry centering on three factors: character of government's action, economic effect of regulation on property, and extent by which regulation has interfered with distinct, investment-backed expectations. U.S.C.A. Const.Amend. 5; M.C.L.A. Const. Art. 10, § 2. Cummins v. Robinson Twp., 283 Mich. App. 677, 770 N.W.2d 421 (2009).

Under "economic impact" criterion of regulatory takings analysis, the court measures the impact of the regulatory change by considering the change in the fair market value of the subject property caused by the regulatory imposition; in other words, the court must compare the value that has been taken from the property with the value that remains in the property. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 29. Kafka v. Montana Dept. of Fish, Wildlife and Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (2008).

In determining whether logging company, that brought inverse condemnation action against state, alleging state had taken its property without compensation by refusing to permit it to log land identified as a nesting site for bald eagles, retained any economically viable use of that property, the Supreme Court would look to logging company's ability to use entire 40-acre parcel that company owned, not merely the nine acres of timber that the regulation affected. West's Or.Const. Art. 1, § 18. Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry, 339 Or. 136, 117 P.3d 990, 61 Env't. Rep. Cas. (BNA) 1133 (2005); West's Key Number Digest, Eminent Domain 2.27(1).

City's rezoning of planned development district by increasing minimum lot size from 6,500 to 12,000 square feet was not a regulatory taking, even though it cut the property value in half, no market existed for the larger lots required by the rezoning, and the developer relied in good faith on city officials' representations about zoning; the property was still worth four times the developer's purchase price, despite the rezoning, and the city did not direct the rezoning at developer although it rezoned the property after he bought it. Vernon's Ann.Texas Const. Art. 1, § 17. Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004); West's Key Number Digest, Bankruptcy 2.10(6).

Evidence in regulatory takings case was legally and factually sufficient to support the jury's finding that the market value of landowner's property with residential zoning ordinance applied was zero; a real estate broker, with 26 years' experience in residential and commercial real estate, testified that the property was not economically feasible to use for residential purposes and that market value of the property with the residential zoning ordinance in effect was zero, and another expert, who had 33 years' experience in general construction and residential and commercial development, testified that he inspected the property and found that it was not suitable to use for residential purposes. U.S.C.A. Const.Amend. 5. City of Sherman v. Wayne, 266 S.W.3d 34 (Tex. App. Dallas 2008); West's Key Number

Digest, Evidence ⚷571(7).

Police action interrupting electricity service: Business owner who leased first floor of building did not suffer an unconstitutional taking of his property when, in response to the actions of protestors who took over the upper two floors of the building, police ordered the termination of utility services for the entire building and utility companies complied with that order, even though the loss of utilities ultimately resulted in loss of the business; there was no actual physical invasion of business owner's premises on the first floor, and business owner was permitted to come and go from his business as he pleased. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 16. Citoli v. City of Seattle, 61 P.3d 1165 (Wash. Ct. App. Div. 1 2002); West's Key Number Digest, Eminent Domain ⚷2(1.1).

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[END OF SUPPLEMENT]

§ 8. Regulation must not deprive owner of economically viable use—Interference with reasonable investment-backed expectations

[Cumulative Supplement]

The Supreme Court in Penn Cent. Transp. Co. v New York City[69] ruled that the property owner's investment could be a relevant consideration in a takings inquiry. One aspect of the relevance of investment-backed expectations as a factor relates generally to whether the property owner reasonably relied to his economic detriment on an expectation that the government would not act as it did.[70] Reliance is not necessarily the focus of the test, but rather whether the regulation permits the owner to make reasonable use of his or her property. As recently observed by the United States Supreme Court: "It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power." Lucas v South Carolina Coastal Council.[71] In situations in which government regulatory activity could not have been readily predicted or foreseen, the resulting economic constraints on property owners were not considered to be excessive or unreasonable.[72] When the landowner acquires property when the challenged zoning regulations are already in effect, he can hardly complain that the challenged regulations have interfered with investment-backed expectations.[73] In such a case, the price paid for the property most likely reflected whatever adverse impact the regulation might have on the fair market value of the property.[74] However, a zoning reclassification after purchase may give rise to a regulatory taking, such as in cases when a landowner purchases property with a reasonable expectation of residential or commercial development and new regulatory constraints only allow him to use his land in its natural state without any economically viable alternative use thereof.[75] Likewise, in permit application cases, a deprivation of reasonable investment-backed expectations may occur such as when a wetlands agency denies a permit for land zoned as a residential building lot and purchased solely for such a use.[76]

Amortization provisions that phase out nonconforming uses usually will withstand judicial scrutiny on takings grounds if they are reasonable in time and purpose.[77]

A New Hampshire court has stated that a blanket rule against amortization provisions should be rejected because such a rule has a debilitating effect on effective zoning, unnecessarily restricts a state's police power, and prevents the operation of a reasonable and flexible method of eliminating nonconforming uses in the public interest.[78] Cases have considered several factors in determining the reasonableness of these provisions. Those factors weigh any circumstance bearing upon a balancing of public gain against private loss, including the length of the amortization period in relation to the nature of the nonconforming use, length of time in relation to the investment, and the degree of offensiveness of the nonconforming use in view of the character of the surrounding neighborhood.[79]

In a Pennsylvania case, the state's highest court adopted a minority view that amortization and discontinuance of a pre-existing nonconforming use is per se confiscatory under the state constitution. In doing so, the court stated that "[i]t is clear that if we were to permit the amortization of nonconforming uses in this Commonwealth, any use could be

amortized out of existence without just compensation. The case involved a zoning ordinance which required amortization and discontinuance of preexisting nonconforming use of the landowner's property as an adult bookstore within 90 days.[80]

CUMULATIVE SUPPLEMENT

Cases:

Maine's free care laws, which require hospitals to provide free medical services to low income patients, did not amount to a compensable taking of hospital's property, despite its impact on hospital's investment-backed expectations, where free care laws included statutory defense to enforcement for hospitals whose economic viability would be jeopardized by compliance, hospital did not allege it faced any threat to its economic viability on account of free care laws, and free care laws left core rights of hospital's property ownership intact. U.S.C.A. Const.Amend. 14; 22 M.R.S.A. §§ 1715, 1716; Code Me.R. § 10–144, Ch. 101, § 1.01 et seq. Franklin Memorial Hosp. v. Harvey,, 575 F.3d 121 (1st Cir. 2009).

In evaluating reasonableness of investment-back expectations of claimant asserting partial regulatory takings claim, court should consider in particular three factors: (1) whether claimant operated in a highly regulated industry, (2) whether claimant was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property, and (3) whether claimant could have reasonably anticipated the possibility of such regulation in light of the regulatory environment at the time of purchase. U.S.C.A. Const.Amend. 5. Appolo Fuels, Inc. v. U.S., 381 F.3d 1338, 59 Env't. Rep. Cas. (BNA) 1135, 34 Envtl. L. Rep. 20087 (Fed. Cir. 2004); West's Key Number Digest, Bankruptcy ⚷2.1.

Developer lacked reasonable, investment-backed expectation when he purchased land in 1973 that he would obtain regulatory approval needed for residential development, and, thus, Army Corps of Engineers' 1994 denial of permit for fill of wetlands adjacent to navigable waters did not effect taking in violation of Fifth Amendment, notwithstanding that denial was based on Endangered Species Act (ESA), which did not exist in 1973; Corps had denied dredge-and-fill permits solely on environmental grounds by 1973, developer acknowledged difficulty of obtaining regulatory approval when he purchased land, developer could not have been oblivious in 1973 to rising environmental awareness, and developer waited seven years after buying land to attempt to obtain permit. U.S.C.A. Const.Amend. 5; Endangered Species Act of 1973, §§ 2 et seq., 16 U.S.C.A. §§ 1531 et seq.; Good v. U.S., 189 F.3d 1355 (Fed. Cir. 1999); West's Key Number Digest, Eminent Domain ⚷2(1.2).

Second, or investment-backed expectations, prong of *Penn Central* test for deciding whether regulation results in temporary, partial taking requires an objective, but fact-specific inquiry into what, under all the circumstances, landowner should have anticipated; landowner's subjective expectations are irrelevant. U.S.C.A. Const.Amend. 5. Resource Investments, Inc. v. U.S., 85 Fed. Cl. 447 (2009).

Factors that court should consider under second, or investment-backed expectations, prong of *Penn Central* test for deciding whether regulation results in a temporary, partial taking are: (1) whether claimant operated in highly regulated industry; (2) whether claimant was aware of problem that spawned the regulation at time it purchased the allegedly taken property; and (3) whether claimant could have reasonably anticipated possibility of such regulation in light of regulatory environment at time of purchase. U.S.C.A. Const.Amend. 5. Resource Investments, Inc. v. U.S., 85 Fed. Cl. 447 (2009).

Salmonella-control regulations of the United States Department of Agriculture (USDA) which required table egg producer to sell its healthy eggs in the less profitable breaker egg market effected a regulatory taking, considering revenue loss suffered by producer, its reasonable investment-backed expectation that it could sell its healthy eggs as table eggs in interstate commerce, and fact that the regulations were misguided because they relied on ineffective testing methods which did not establish that salmonella epidemic was largely the result of producer's eggs. 9 C.F.R. §§ 82.30-82.38. Rose Acre Farms, Inc. v. U.S., 55 Fed. Cl. 643 (2003); West's Key Number Digest, Eminent Domain ⚷2(5).

Frustration of contract expectancy: *Omnia* rule that frustration of a contract expectancy does not constitute a taking was not applicable to claim that right to use water was taken when the government imposed water use restrictions under the Endangered Species Act, since water contracts conferred on users a right to the exclusive use of pre-

scribed quantities of water, and thus their contract rights gave rise to a property interest. Endangered Species Act of 1973, § 2 Am. Jur., as amended, 16 U.S.C.A. § 1531. Tulare Lake Basin Water Storage Dist. v. U.S., 49 Fed. Cl. 313 (2001); West's Key Number Digest, Eminent Domain 2(10).

In a regulatory taking case, the comparative value of the property before and after a regulatory imposition is not the sole indicia of the economic impact of the regulation; rather, in assessing the severity of the economic impact of the regulations, the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored, requiring the court to compare the relationship of the owner's basis or investment in the property before the alleged taking to the fair market value of the property after the alleged taking. U.S.C.A. Const. Amend. 5. Walcek v. U.S., 49 Fed. Cl. 248 (2001); West's Key Number Digest, Eminent Domain 2(1).

Second factor of the *Penn Central* regulatory taking analysis, interference with distinct investment-backed expectations, is a way of limiting takings recoveries to owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime. U.S.C.A. Const. Amend. 5. Walcek v. U.S., 49 Fed. Cl. 248 (2001); West's Key Number Digest, Eminent Domain 2(1).

Fact issues existed as to whether requirements of Pennsylvania Avenue Plan imposing limitations upon development of historical sites constituted "taking" of property located on block, which was deemed historical site and which was subject to limitations under Plan, by infringing distinct investment-backed expectations. Atlas Enters. Ltd. Partnership v United States (1995) 32 Fed Cl 704.

County's issuance of alternative well permit with conditions that placed limit on landowner's groundwater extractions did not constitute "regulatory taking" for which landowner was entitled to compensation; county's action did not physically invade or appropriate landowner's property or groundwater, no economic impact was demonstrated other than alleged reduced profits via below market rental rate or diminution in value as result of inability to use entire 2400-acre property for farming, and there was no demonstrable interference with distinct investment backed expectations. U.S.C.A. Const.Amend. 5; West's Ann.Cal. Const. Art. 1, § 19. Allegretti & Co. v. County of Imperial, 138 Cal. App. 4th 1261, 42 Cal. Rptr. 3d 122, 36 Envtl. L. Rep. 20085 (4th Dist. 2006), review denied, (July 26, 2006) and petition for cert. filed, 75 U.S.L.W. 3248 (U.S. Oct. 24, 2006); West's Key Number Digest, Eminent Domain 2.17(2).

Landowners asserted an as-applied taking claim against city regarding property that had been zoned as Conservation Offshore Island (OS), which restricted their use of it, even though landowners' claim used language applicable to a facial taking standard of proof; landowners were not denied all economically beneficial use of the property as a result of the regulations, landowners' investment-backed expectations for development were minimal, and Rate of Growth Ordinance (ROGO) allocation points remained available, showing that property retained some economic value. U.S.C.A. Const.Amend. 5; West's F.S.A. Const. Art. 10, § 6(a). Shands v. City of Marathon, 999 So. 2d 718 (Fla. Dist. Ct. App. 3d Dist. 2008).

Enactment of county's comprehensive plan for the Florida Keys did not deprive landowners of all reasonable economic use of their properties, and thus alleged taking of their properties by the county was not a facial taking but rather was an as-applied taking and four-year statute of limitations applicable to inverse condemnation actions began to run only when board of county commissioners concluded on landowners' beneficial use determination (BUD) petitions that the comprehensive plan resulted in a taking of landowners' properties; though special master in proceedings on the BUD petitions found that the comprehensive plan deprived landowners of all economic use of their properties, some of the landowners were able to obtain building permits or sell their property after they filed their BUD petitions, and landowners' taking claims only became ripe when county board of commissioners rendered a final decision on the BUD applications. West's F.S.A. § 95.11(3)(p). Collins v. Monroe County, 999 So. 2d 709 (Fla. Dist. Ct. App. 3d Dist. 2008).

"Reasonable investment-backed expectations" factor incorporates an objective test for a regulatory taking. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 29. Kafka v. Montana Dept. of Fish, Wildlife and Parks, 2008 MT 460, 348 Mont. 80, 201 P.3d 8 (2008).

Rezoning of properties from commercial to residential did not constitute a regulatory taking, in absence of evidence that the rezoning substantially interfered with property owner's distinct investment-backed expectations. U.S.C.A. Const.Amend. 5. State ex rel. Gilmour Realty, Inc. v. Mayfield Hts., 122 Ohio St. 3d 260, 2009-Ohio-2871, 910 N.E.2d 455 (2009).

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[END OF SUPPLEMENT]

§ 9. Regulation must not deprive owner of economically viable use—Character of governmental action

[Cumulative Supplement]

The character of the government action is a significant consideration in determining whether a taking has occurred. In Penn Cent. Transp. Co. v New York City,[81] the court held that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[82]

The Court in Penn Central recognized that "in a wide variety of contexts, the government may execute laws and programs that adversely affect recognized economic values."[83] "[I]n instances in which [government] reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, [the] Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."[84] Zoning laws are a "classic example" of "permissible governmental action even when prohibiting the most beneficial use of the property."[85] The Court also recognized that "[l] egislation designed to promote the general welfare commonly burdens some (owners) more than others."[86] It rejected the contention that the plaintiff was solely burdened and unbenefitted by the regulation restricting building inconsistent with the landmark law.[87]

In Agins v Tiburon,[88] the Court found no indication that the appellants' 5-acre tract was the only property affected by the open space building restrictions. It found, therefore, that they "will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that [the property owner] might suffer."[89]

Ordinarily, airplane overflights associated with nearby airports will not constitute physical invasions of private property amounting to a physical taking.[90] Similarly, noxious uses carried on by government authorities located adjacent to a landowner's property will not generally constitute a physical invasion giving rise to a viable takings claim. Damages may, however, be sought on state common law nuisance grounds.[91] Rent control ordinances are generally considered a constitutional economic regulation which does not exact a per se physical taking.[92] However, if some physical invasion is in fact demonstrated, there is no de minimis rule. As the Supreme Court has observed: "[N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for physical invasion]."[93]

CUMULATIVE SUPPLEMENT

Cases:

Landowners' § 1983 substantive due process claim will not be denied summarily, where they have proffered evidence that city took steps to apply facially neutral ordinances to their land in such way as to depress its value and to scare off competing purchasers from private sector so as to insure that it would have opportunity to acquire land at price substantially less than would be fetched in open market, because such course of behavior would amount to abuse of governmental power sufficient to comprise violation of Fourteenth Amendment. Moore v City of Tallahassee (1995, ND Fla) 928 F Supp 1140.

When applying the third, or character of government action, prong of *Penn Central* test for whether a regulation results in temporary, partial taking, court must consider nexus between regulation and its effects, looking at the relative benefits and burdens associated with regulatory activity. U.S.C.A. Const.Amend. 5. Resource Investments, Inc. v.

U.S., 85 Fed. Cl. 447 (2009).

Under state common law, landowners have duty to prevent activities and conditions on their land which create unreasonable risk of harm to others and cannot reasonably expect to put property to use that constitutes nuisance, even if that is only economically viable use for property, and thus have no right to pollute stream or use property in manner that could result in spread of radioactive contamination. Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. Ct. App. 1996), cert. denied, (July 28, 1997).

Mere inconvenience to customers: Reconfiguration of road to prevent left turns into and out of shopping center's main entrance and make main entrance from narrower entrance near stores was a taking of owner's right of access; the reconfiguration caused cars to stack up in front of stores, the changes exceeded mere inconvenience, and owner's injury differed from what the public experienced. U.S.C.A. Const.Amend. 5. State v. Kimco of Evansville, Inc., 881 N.E.2d 987 (Ind. Ct. App. 2007), transfer granted, opinion vacated, IN RAP 58(A), 891 N.E.2d 50 (Ind. 2008); West's Key Number Digest, Eminent Domain 2.19(1).

Ban of breed, under county ordinance which banned possession of pit bull terriers, was a legitimate exercise of county fiscal court's police power, and thus, no compensation was required or due to dogs' owners; determination by fiscal court that pit bull terriers had "inherently vicious and dangerous propensities" was reasonable, and since forfeiture and destruction of such dogs was pursuant to valid exercise of police power, no compensation was required. KRS 258.245. Bess v. Bracken County Fiscal Court, 210 S.W.3d 177 (Ky. Ct. App. 2006); West's Key Number Digest, Animals 3.5(3).

Trial court used correct test in determining whether tenant that leased property adjacent to city airport presented evidence of a taking; city's actions could not be definitively categorized as regulatory taking, such that court was required to apply balancing test, since city did not "take" tenant's property by overburdening it with regulations, but rather inhibited tenant's construction because of contemplated expansion of airport, and tenant presented evidence of a decline of its property, and evidence that city abused its powers in its actions aimed at property, and tenant had to prove de facto taking through inverse condemnation. Merkur Steel Supply Inc. v. City of Detroit, 261 Mich. App. 116, 680 N.W.2d 485 (2004), appeal denied, 471 Mich. 884 (2004); West's Key Number Digest, Bankruptcy 2.8.

Fundamental attributes of ownership: In making threshold determination as to whether regulation of land use constitutes taking without just compensation, court first asks whether regulation destroys or derogates any fundamental attribute of ownership; if owner claims less than a physical invasion or a total taking, and regulation does not implicate fundamental attributes of ownership, court will proceed to next threshold inquiry, analyzing whether regulation safeguards the public interest in health, safety, the environment, or the fiscal integrity of an area, or whether the regulation seeks to impose requirement of providing an affirmative public benefit; if answer to either question is yes, court must determine whether regulation advances a legitimate state interest and whether that interest is outweighed by its adverse impact to the landowner. Paradise, Inc. v. Pierce County, 102 P.3d 173 (Wash. Ct. App. Div. 1 2004); West's Key Number Digest, Bankruptcy 2.1.

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[END OF SUPPLEMENT]

§ 10. Regulation must not deprive owner of economically viable use—Harm prevention regulations

[Cumulative Supplement]

Courts often take an additional factor into account in ruling on whether a particular land use regulation constitutes a regulatory taking. Many courts have employed a harm-prevention analysis and uphold a regulation even when all economically viable use of the landowner's property has been taken so long as the regulation is aimed at preventing a serious public harm.[94] Although this harm prevention analysis is grounded in longstanding precedent that economic loss to a private property owner is irrelevant when government regulation furthers the legitimate purpose of preventing harm to the public,[95] it is questionable how valid this line of cases may be in light of the 1992 Supreme Court decision in Lucas v South Carolina Coastal Council.[96]

Under Lucas, if a government regulation deprives a landowner of all beneficial and productive use of his property,

just compensation is due even if the regulation is aimed at preventing a serious public harm. The only exception to this categorical rule is when in the context of a total regulatory taking, the government can show that the landowner's expectations regarding use of the property are unreasonable in light of state common law nuisance and property law principles. The Supreme Court addressed the question whether a state's interest in preventing beachfront erosion under its police power would enable the state to prevent a homeowner from constructing beachfront homes on land that he had purchased prior to the promulgation of a regulation prohibiting such construction. The Court determined that plaintiff could not be denied compensation for a taking merely because the state might have the police power to prevent such construction. According to the Court, two instances occur in which regulatory action would be "compensable without case-specific inquiry into the public interest advanced in support of the restraint."[97] The first category of regulation is one where the owner is compelled to suffer a physical "invasion" of his property.[98] The second category is when a regulation "denies all economically beneficial or productive use of land."[99]

The Lucas case challenged the South Carolina Beachfront Management Act's[1] setback provision, which prohibited David Lucas from constructing a house on a portion of a barrier island he owns. The South Carolina Supreme Court had concluded that because the regulation "prevented a use seriously harming the public, ... no regulatory taking ha[d] occurred."[2] The court reached its conclusion by relying on the Mugler line of nuisance-type cases, followed by the US Supreme Court's 1987 taking decision in Keystone Bituminous Coal Ass'n v DeBenedictis.[3] However, the Mugler rationale for upholding government regulation to prevent public harm now has been severely limited by the US Supreme Court by its recent decision in Lucas.

The US Supreme Court set out new guidelines in the context of government regulation that works a total taking of a landowner's property. The basic rule provided by the Court declares that when a government regulation acts to take all beneficial and productive use of a landowner's property, a taking has occurred, which requires just compensation. This holds true regardless of whether the regulation is aimed at preventing some public harm. The earlier Mugler nuisance-type reasoning can only be relied upon by government regulators where it can be shown by specific findings of fact that the land use control is necessary to prevent a serious public harm.[4] Legislative declarations that a regulation is aimed at protecting the public welfare will no longer suffice absent evidence that there is a legitimate nexus between the regulation and the harm it seeks to prevent. Moreover, the purpose behind the regulation must be supported by the state's common law of property and nuisance.[5] When such a complete deprivation occurs, the fact that the regulation advances a substantial state interest, or otherwise protects the general welfare by preventing a harmful use, becomes irrelevant. The regulatory authority can only avoid compensation if it can be shown that the property owner's "bundle of rights" never included the right to use the land in the way the regulation forbids.[6]

CUMULATIVE SUPPLEMENT

Cases:

Agricultural quarantine: Officials within state Department of Agriculture had not deprived poultry farmer of his property interest in his business's lost profits and goodwill without procedural due process of law, by having quarantined his birds and ordered their destruction; emergency existed after farmer's birds tested positive for contagious avian influenza virus, officials did not abuse discretion in that they did not quarantine birds until after receiving notice of positive test results, birds were ordered destroyed only after additional test confirmed results and outside experts were consulted, and state provided farmer with post-deprivation remedies. U.S.C.A. Const.Amend. 14; C.G.S.A. §§ 22-324, 22-234(a), 22-326c. Webster v. Moquin, 175 F. Supp. 2d 315 (D. Conn. 2001); West's Key Number Digest, Animals 30.

Construction of residences in landslide area did not pose reasonable probability of significant harm to persons or property, as required for such construction to be subject to injunction as public or private nuisance, and thus construction moratorium depriving lots of all economically beneficial use was a permanent categorical taking under state takings clause, since there was nothing inherently harmful about landowners building residences, even if stability of area's geology was uncertain and geotechnical engineer's analysis indicated that homeowners' lots "should" be moving, absent evidence that construction of residences would destabilize landslide; global positioning system (GPS)

monitoring did not indicate that land was moving in vicinity of homeowners' lots, any damage to residences from land movement could be repaired, block glides generally presented no risk to people because they slide along a single plane, and any potential lawsuits against city based on a future landslide were purely speculative. West's Ann.Cal. Const. Art. 1, § 19; Restatement (Second) of Torts § 821F. Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263, 84 Cal. Rptr. 3d 75 (2d Dist. 2008), as modified on denial of reh'g, (Oct. 22, 2008) and review filed, (Nov. 10, 2008); West's Key Number Digest, Nuisance 4.

Prohibiting coal mining in an area around village's water wells was a "taking" of mining interests that were exercised without being a qualified public nuisance; the prohibition of mining due to a finding that it could result in a substantial loss or reduction of long-range productivity of water supply or aquifers and aquifer recharge areas did not inhere in mineral lessees' title, and since they owned no surface rights in these areas, the regulation deprived them of all economically viable use of the land. U.S.C.A. Const. Amend. 5; R.C. § 1513.073(A)(2)(c). State ex rel. R.T.G., Inc. v. State, 141 Ohio App. 3d 784, 753 N.E.2d 869 (10th Dist. Franklin County 2001); West's Key Number Digest, Eminent Domain 2(1.2).

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[END OF SUPPLEMENT]

§ 10.5. Rough proportionality

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Homebuilding contractor failed to show that requirements for some minimal landscaping and compliance with municipality's standard specifications were conditions or exactions that were not proportional to the subdivisions' impact, as was required to establish Nollan/Dolan theory of taking. Spinell Homes, Inc. v. Municipality of Anchorage, 78 P.3d 692 (Alaska 2003); West's Key Number Digest, Eminent Domain 2(1.2).

The *Nollan/Dolan* nexus and rough proportionality test to determine the validity of land use exactions under the federal takings clause did not apply to city ordinance requiring developers of housing projects to construct affordable housing, since that ordinance was a generally applicable legislative general zoning decision rather than an individual adjudicative permit approval decision. U.S.C.A. Const.Amend. 5. Action Apartment Ass'n v. City of Santa Monica, 166 Cal. App. 4th 456, 82 Cal. Rptr. 3d 722 (2d Dist. 2008), review filed, (Oct. 6, 2008); West's Key Number Digest, Eminent Domain 2.10(7).

Heightened scrutiny: City's "conversion fee" for converting alleged residential hotel rooms so they could be used for short-term tourist rentals, imposed "in lieu" of taking the hotel's property itself, was an individualized, discretionary exaction that was subject to heightened scrutiny for a taking under *Dolan* "rough proportionality" and *Nollan* "essential nexus" inquiries. U.S.C.A. Const.Amend. 5; California Constitution Art 1, § 19. San Remo Hotel L.P. v. City and County of San Francisco, 82 Cal. App. 4th 1105, 98 Cal. Rptr. 2d 792 (1st Dist. 2000), republished at, 83 Cal. App. 4th 239, 100 Cal. Rptr. 2d 1 (1st Dist. 2000), as modified on denial of reh'g, (Sept. 6, 2000); West's Key Number Digest, Eminent Domain 2(1.2).

No precise mathematical calculation is required by the rough proportionality test of whether an exaction as a condition of development is a taking, but the governmental entity must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development. U.S.C.A. Const. Amend. 5; West's C.R.S.A. Const. Art. 2, § 15. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001); West's Key Number Digest, Eminent Domain 2(1.2).

Applicant required to submit Dolan report: City's zoning ordinance requiring applicants for building permits to submit a "rough proportionality report" by a qualified engineer regarding any exactions that the applicant does not

consent to did not, on its face, violate the Takings Clause by diminishing the city's ultimate responsibility to demonstrate that any exaction-type conditions were roughly proportional to project impacts. U.S.C.A. Const.Amend. 5. Lincoln City Chamber of Commerce v. City of Lincoln City, 164 Or. App. 272, 991 P.2d 1080 (1999), review denied, 330 Or. 331, 6 P.3d 1101 (2000); West's Key Number Digest, Eminent Domain 2(1.2).

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[END OF SUPPLEMENT]

§ 11. Validity of permit conditions

[Cumulative Supplement]

In 1987, the US Supreme Court rendered its landmark decision in Nollan v California Coastal Com.,[7] examining the issue of when the requirement of an easement for public access as a condition for a coastal construction permit would amount to a "taking" of private property without compensation. Essentially, the court held there must be a substantial connection, or "nexus" between the public burden created by the construction and the necessity for the easement.[8] Without such a connection, there is an inference the government is simply trying to expropriate property without paying for it.[9]

In Nollan, two homeowners owned a beach front lot. The building on the lot was a small bungalow which had fallen into disrepair. The owners sought to demolish the bungalow and replace it with a three-bedroom house in keeping with the rest of the neighborhood. The Coastal Commission, however, would only permit the owners to replace the structure if they granted an easement allowing the public to cross a portion of their property. The owners challenged the Commission's requirement, and the case eventually came before the United States Supreme Court. In a five-to-four decision written by Justice Scalia, the Supreme Court held the lack of "nexus" between the public burden created by the proposed new construction and the condition required by the Commission (allowing the public to pass over the property) meant the Commission was, in effect, taking the homeowner's property without compensation. The Supreme Court noted the proposed new construction did not block access to the publicly owned shoreline or nearby beaches. From this fact the high court reasoned that there was some other, more sinister, purpose to the requirement that the owners allow the public to cross over their property. This purpose was the obtaining of an easement by the government without paying for it. The court thus concluded requiring relinquishment of the owners' right to exclude others from their private beach as a condition of the proposed construction amounted to virtual extortion.[10] Nollan thus requires a substantial relationship between the public burden posed by proposed construction and conditions imposed by the government to permit that construction.[11]

The US Supreme Court thus held that this type of condition amounts to an unconstitutional taking unless there is an "essential nexus" between the land use regulation that the permit condition is intended to implement and the permit condition.[12]

Development impact fee ordinances are also subject to the Nollan "nexus" test, however, and are governed by a lesser constitutional standard of scrutiny. Development conditions that constitute a possessory or physical encroachment on land are governed by the heightened "substantial" relationship test,[13] whereas impact fees and off-site public improvements are evaluated using a lesser "reasonable" relationship test.[14]

CUMULATIVE SUPPLEMENT

Cases:

Dolan "roughly proportional" test for analyzing regulatory taking claims under Fifth Amendment, which considers whether dedications demanded as conditions for property development are proportional to development's

anticipated impacts, is limited in applicability to special context of exactions, in which land use decision conditions approval of development on dedication of property to public use, and does not apply where landowner's challenge is based solely on denial of development approval, rather than excessive exactions. U.S.C.A. Const.Amend. 5. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S. Ct. 1624, 143 L. Ed. 2d 882 (U.S. 1999); West's Key Number Digest, Eminent Domain 2(1.2).

Misguided regulation: Salmonella-control regulations of the United States Department of Agriculture (USDA) which required table egg producer to sell its healthy eggs in the less profitable breaker egg market effected a regulatory taking, considering revenue loss suffered by producer, its reasonable investment-backed expectation that it could sell its healthy eggs as table eggs in interstate commerce, and fact that the regulations were misguided because they relied on ineffective testing methods which did not establish that salmonella epidemic was largely the result of producer's eggs. 9 C.F.R. § 82.30-82.38. Rose Acre Farms, Inc. v. U.S., 53 Fed. Cl. 504 (2002); West's Key Number Digest, Eminent Domain 2(5).

Mitigation fee charged, pursuant to city's residential hotel conversion and demolition ordinance (HCO), to owners of residential hotel who converted hotel to tourist use, did not constitute a taking, as applied, on grounds that owners, in order to obtain conditional use permit, had also offered lifetime leases to existing residential tenants; HCO reasonably sought to preserve the supply of affordable housing units, rooms designated residential and temporarily vacant or rented to tourists, or occupied by tenants who refused lifetime leases, would still be lost by conversion, and even if no current residents were required to move, city would still lose affordable housing units. West's Ann.Cal. Const. Art. 1, § 19. San Remo Hotel L.P. v. City And County of San Francisco, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002); West's Key Number Digest, Eminent Domain 2(1.2).

"Land use exactions," or demands by governments that landowners dedicate portions of their property as a condition of securing development permits, are valid under the federal takings clause if there is an essential nexus between the legitimate state interest the government asserts will be furthered by the condition of the development permit and the exaction itself, and there is a rough proportionality between a development restriction imposed on the landowner and the extent of the impact the state imposed development condition is supposed to mitigate. U.S.C.A. Const.Amend. 5. Action Apartment Ass'n v. City of Santa Monica, 166 Cal. App. 4th 456, 82 Cal. Rptr. 3d 722 (2d Dist. 2008), review filed, (Oct. 6, 2008); West's Key Number Digest, Eminent Domain 2.10(7).

[Top of Section]

[END OF SUPPLEMENT]

§ 12. Temporary regulatory takings

[Cumulative Supplement]

If a landowner challenges a regulation on takings grounds and the court finds it constitutes an unconstitutional taking of property without just compensation, the regulation may be changed to permit the landowner economically viable use of the property. The subsequent amendment will not, however, relieve the government from paying just compensation for the period during which the unconstitutional regulation was in effect. In First English Evangelical Lutheran Church v County of Los Angeles,[15] the court essentially held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[16]

First English does not create a new liability standard to determine when a "temporary" taking occurs, but clarifies the appropriate remedy after a taking is recognized. The rule appears to presuppose that "temporary regulatory takings" means "regulatory takings which are ultimately invalidated by the courts."[17] Courts have uniformly construed the essential holding of First English narrowly.[18] Numerous cases have been brought to challenge interim zoning measures, such as building moratoria, on "temporary" takings grounds. However, these cases have rarely been successful.[19] To succeed on temporary regulatory takings grounds, the landowner must first demonstrate that the interim zoning measure amounted to a taking before the remedial rule of First English that "temporary" takings must be compensated will apply.[20] Likewise, ordinary administrative delays inherent in government decisionmaking

processes will not give rise to temporary takings claims.[21]

CUMULATIVE SUPPLEMENT

Trial Strategy

Recovery of Damages for Temporary Conditions Ensuing From Construction or Repair of Public Improvement, 51 Am. Jur. Proof of Facts 3d 489

Cases:

Temporary moratoria on land development caused by government's denial of necessary permits can qualify as compensable Fifth Amendment takings. U.S.C.A. Const.Amend. 5. Cooley v. U.S., 324 F.3d 1297, 56 Env't. Rep. Cas. (BNA) 1262, 33 Envtl. L. Rep. 20161 (Fed. Cir. 2003); West's Key Number Digest, Eminent Domain 114.1.

In deciding whether a regulation that does not deprive property owner of all economically viable use if his land nonetheless effects a temporary, partial taking under the *Penn Central* test, court must engage in extensive examination of facts to determine whether regulation is simply adjusting benefits and burdens of economic life to promote the common good or whether it instead so frustrates distinct investment-backed expectations as to amount to a "taking." U.S.C.A. Const.Amend. 5. Resource Investments, Inc. v. U.S., 85 Fed. Cl. 447 (2009).

Refusal of Army Corps of Engineers to grant permit for filling of wetlands property did not establish landowners' temporary regulatory taking claim where property remained economically viable and there was legitimate state interest in preserving quality of water within area. Marks v United States (1995) 34 Fed Cl 387.

The temporary moratorium on property owners' proposed use of water from the sensitive sole source aquifer and the additional permit requirements did not constitute a taking of private property for public use under the constitutions of the United States and the State; the moratorium on temporary permits was a temporary restriction, at most, on the property owners' use of their water, and the additional requirement on applicants for regular permits was a proper regulation of the State's water resources in the exercise of the Legislature's police power. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 24; 82 Okl.St.Ann. §§ 1020.9-1020.9B. Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, 148 P.3d 842 (Okla. 2006), as corrected, (Nov. 6, 2006); West's Key Number Digest, Eminent Domain 2.17(2).

Township's temporary moratorium on development of land, pending township's consideration of changes to township's comprehensive plan for land use, did not constitute so onerous burden of home builder's use of his land, under circumstances, as to constitute "taking," as would require compensation under eminent domain law; moratorium was reasonably related to promotion of public's general welfare, moratorium's enactment substantially advanced legitimate government purpose, and, while builder may have been temporarily deprived of most profitable use of affected land, viable land uses remained available to builder. U.S.C.A. Const.Amend. 14; 26 P.S. § 1-502(e). Nolen v. Newtown Tp., 854 A.2d 705 (Pa. Commw. Ct. 2004); West's Key Number Digest, Bankruptcy 2.10(1).

Fifteen-month moratorium on the filing and acceptance of plats in planned developments substantially advanced a legitimate governmental purpose and was not a taking of developer's property; during eight months of the moratorium, the city rezoned seven planned developments in an orderly, but slow, process toward resolving the differences between the city council, the planning and zoning commission, and the city's consultant, and the developer did not show that the moratorium had an economic impact distinct from the rezoning or how his reasonable, investment-backed expectations excluded the possibility of a fifteen-month delay. Vernon's Ann.Texas Const. Art. 1, § 17. Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004); West's Key Number Digest, Bankruptcy 2.10(6).

[Top of Section]

[END OF SUPPLEMENT]

§ 12.5. Defenses to regulatory takings claims

[Cumulative Supplement]

CUMULATIVE SUPPLEMENT

Cases:

Neither property owner's inability to exclude spotted owls from its property nor injunction, obtained by government, requiring owner to permit government agents to enter its property to conduct owl surveys over five month period amounted to physical occupation of property that would support owner's per se takings claim, as loss of right to exclude owls resulted from their listing as threatened species under Endangered Species Act (ESA), not from injunction, and transient, nonexclusive entries by agents to conduct owl surveys did not permanently usurp owner's exclusive right to possess, use, and dispose of its property. U.S.C.A. Const.Amend. 5. Boise Cascade Corp. v. U.S., 296 F.3d 1339 (Fed. Cir. 2002), reh'g and reh'g en banc denied, (Sept. 3, 2002); West's Key Number Digest, Eminent Domain 2(5).

Secretary of the Interior's designation of land as unsuitable for surface mining pursuant to the Surface Mining Control and Reclamation Act (SMCRA) did not effect a regulatory taking, where character of government's action neither required nor foreclosed finding of a taking, property owner's investment-backed expectations were unreasonable, and tracts had a significant market value after the Secretary's unsuitability decision. Surface Mining Control and Reclamation Act of 1977, §§ 101 et seq., 30 U.S.C.A. §§ 1201 et seq. Cane Tennessee, Inc. v. U.S., 71 Fed. Cl. 432 (2005); West's Key Number Digest, Eminent Domain 2.13.

City's failure to enforce ordinance requiring owner of abutting subdivision to provide access to adjoining unplatted areas, and its subsequent amendment of ordinance to eliminate the requirement, did not satisfy ripeness requirement of final decision before landowners could bring regulatory takings claim; landowners failed to submit a development plan or seek a variance from amended ordinance, and, thus, city did not have opportunity to make a final decision applying the regulation specifically to landowners' property. Vernon's Ann.Texas Const. Art. 1, § 17. City of El Paso v. Maddox, 276 S.W.3d 66 (Tex. App. El Paso 2008), reh'g overruled, (Oct. 29, 2008) and petition for review filed, (Jan. 12, 2009).

Passage of ordinance that increased minimum square footage requirement for single family apartment units from 800 to 1200 did not constitute a "regulatory taking" of property for which owner had earlier obtained court judgment that reversed city's revocation of permit to construct apartments of 900 square feet each, in absence of evidence that passage of ordinance actually denied all economically viable use of property. Champion Builders v. City of Terrell Hills, 70 S.W.3d 221 (Tex. App. San Antonio 2001), review granted, (Oct. 10, 2002); West's Key Number Digest, Eminent Domain 2(1.2).

[Top of Section]

[END OF SUPPLEMENT]

II. Elements of Proof

§ 13. Proof of inverse condemnation; checklist

[Cumulative Supplement]

Evidence of the following facts and circumstances are used to prove the unconstitutionality of zoning and land use regulations on regulatory takings grounds.

GENERAL INFORMATION

[] Description of Property

— Zoning Map

— Photographs

— Visit to Property

— Copy of Zoning Ordinance

PROOF OF INVERSE CONDEMNATION CLAIM

[] Claim Is Ripe for Adjudication [§ 3]

— Exhaustion of Administrative Remedies

— Final Agency Decision Rendered

— Application for Permit, Variance, or Zoning

[] Reclassification Would Be Futile

— Permit Applied for and Denied

— Variance Applied for and Denied

— Zoning Change Applied for and Denied

— Multiple Permit Applications Submitted and Denied

[] Regulation Does Not Further Legitimate Public Interest [§ 5]

[] Deprivation of Economically Viable Use of Property [§ 6]

[] Determination of What Property Has Been Taken [§ 4]

— Interference with Investment-Backed Expectations [§ 8]

— Adverse Economic Impact on Landowner [§ 7]

— Mere Diminution of Value Not Enough [§ 7]

— Physical Invasion of Property [§ 9]

— Regulation Aimed at Prevention of Public Harm [§ 10]

— Public Health and Safety Purpose Effectuates Total Taking of Property [§ 10]

— Public Health and Safety Goal of Regulation Not Supported by State Common Law Nuisance [§ 10]

[] Nexus Between Permit Condition and Purpose of Regulation Lacking [§ 11]

[] Nexus Between Development Exaction and Development Impact Lacking [§ 11]

[] Invalidated Regulation Effectuates Temporary Regulatory Taking [§ 12]

CUMULATIVE SUPPLEMENT

Cases:

Under the arbitration standard for reviewing whether zoning regulation resulted in a taking, the burden is on the landowner to demonstrate that governmental action denied the landowner all reasonable use of the property; if an alternative use is available, even if it is not the most profitable use, the regulation has not denied the property all economically beneficial use. M.S.A. Const. Art. 1, § 13. Concept Properties, LLP v. City of Minnetrista, 694 N.W.2d 804 (Minn. Ct. App. 2005), review denied, (July 19, 2005); West's Key Number Digest, Eminent Domain 2.10(5).

Burden of proof: In inverse condemnation case, property owner is required to show that there has been substantial destruction of value of her property and that defendant's activities have been substantial factor in bringing this about. Township of West Windsor in the County of Mercer v. Nierenberg, 150 N.J. 111, 695 A.2d 1344 (1997).

A landowner is not required to prove that he or she has been deprived of all beneficial use of his or her property; to establish a de facto taking, the landowner must establish that there were exceptional circumstances which substantially deprived the property owner of the beneficial use and enjoyment of his or her property. Miller & Son Paving v Plumstead Twp. (1996, Pa Cmwlth) 680 A2d 5.

For purposes of determining whether a de facto taking of property has occurred, the beneficial use of the property includes not only its present use, but also all potential uses, including its highest and best use. Miller & Son Paving v Plumstead Twp. (1996, Pa Cmwlth) 680 A2d 5.

The burden of proof usually rests on the party challenging a land-use regulation and alleging a taking; however, where a city makes an adjudicative decision to condition development of an individual parcel of land on the exaction of certain benefits from the developer, the burden of proof rests on the city. U.S.C.A. Const.Amend. 5; Art. 1, § 17. Town of Flower Mound v. Stafford Estates Ltd. Partnership, 71 S.W.3d 18 (Tex. App. Fort Worth 2002), reh'g overruled, (Mar. 14, 2002) and petition for review filed, (Apr. 25, 2002); West's Key Number Digest, Eminent Domain 295.

There are two independent hurdles to a Fifth Amendment takings claim against a state entity; first, the property owner must demonstrate that it has received a final decision regarding the application of the challenged regulation to the property at issue from the governmental entity charged with implementing the regulation, and second, if a state provides an adequate procedure for seeking just compensation, the property owner must show that it has used that procedure and been denied just compensation. U.S.C.A. Const.Amend. 5. Town of Flower Mound v. Stafford Estates Ltd. Partnership, 71 S.W.3d 18 (Tex. App. Fort Worth 2002), reh'g overruled, (Mar. 14, 2002) and petition for review filed, (Apr. 25, 2002); West's Key Number Digest, Eminent Domain 277.

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[END OF SUPPLEMENT]

III. Proof of Facts Necessary to Challenge Zoning Restrictions on Regulatory Takings Grounds

A. Testimony of Owner's Planning Consultant

[This hypothetical involves a suburban community which has undergone substantial growth in its residential housing stock. As a result of pressure from homeowners, the zoning ordinance has been amended by placing a number of constraints upon properties zoned for commercial use. The plaintiff claims that those constraints are so severe as to amount to a taking of his commercially zoned vacant land. For the purpose of this hypothetical it is assumed that the plaintiff has pursued any available administrative relief without success. The order of witnesses is a question of judgment in each situation depending on the strength of the testimony and the order in which certain evidence needs to be put before the court in order for subsequent witnesses to testify. While in this example the property owner is among the last to testify, there may be instances where it is preferable to take that testimony first.]

§ 14. Introductory matters

Q.
Please state your name.
A.
_____.
Q.
What is your current occupation?
A.
I am the president of the _____ Corporation, planning consultants, which I founded in 1983.
Q.
What positions did you hold prior to forming the _____ Corporation?
A.
I served as commissioner of planning for the City of _____ from 1972 to 1975, and from 1975 to 1983 I served as a planner with the firm of _____.[At this point the witness should be fully qualified by going through her education, degrees held, organizational affiliations, published writings, teaching experience and past qualifications as an expert witness.]

Use of curriculum vitae in qualification of witness as expert.

To qualify a witness as an expert, evidence should be elicited showing the education, training, and experience of the witness in the particular field, including the length of actual practice, teaching experience, books and articles written by the witness, and membership in professional organizations and societies. See 31A Am. Jur. 2d, Expert and Opinion Evidence §§ 55–67. With the permission of opposing counsel and the court, the party presenting the witness may save time by introducing a written curriculum vitae or resume of the witness's qualifications. A written curriculum vitae should not be used as a substitute for oral testimony on the expert's principal qualifications, however. The technique is generally reserved for showing the jury an extensive list of the witness's publications, grants, or other credentials without exhausting the jury's interest or patience by having the witness testify to such matters orally.

§ 15. Evaluation of developmental potential of plaintiff's property

Q.
In conjunction with this action were you retained by the plaintiff to undertake an evaluation of his property in order to determine its development potential?
A.
Yes.
Q.
Would you please tell the court what information you reviewed.
A.
In addition to visiting the site I reviewed a number of documents specific to the site. Those documents included a survey, a tree inventory and topographical map of the site. In addition, I reviewed the state wetlands maps and the

federal emergency management administration flood maps. In this way I was able to determine which areas on the site were either within designated wetlands or within federally mapped flood zones. I then reviewed the local zoning ordinance, the zoning map, the site plan review law and building code to determine what general constraints existed and how those constraints might relate to the property in question.[The various documents referred to should have been placed in evidence through a witness who could authenticate them. Local regulations and official maps can generally be entered through stipulation of the parties.]

Admissibility of maps, diagrams, and drawings.

A map, diagram, or drawing illustrating the scene of an accident or the relative location of objects is generally admissible in evidence, whether the exhibit was made prior to trial or during the testimony of a witness at trial. If the exhibit was not made in court, there must be some authenticating evidence, usually from the person who prepared the exhibit or from someone who is familiar with what is portrayed, that the exhibit is an accurate representation of what it purports to depict. If the exhibit is made in court, the act of the witness in making it is generally considered sufficient verification. Such exhibits can greatly assist the trier of fact in visualizing the scene or objects involved in the case. See 29 Am. Jur. 2d, Evidence §§ 988–992. See also Preparing and Using Maps, 2 Am. Jur. Trials 669; Preparing and Using Diagrams, 3 Am. Jur. Trials 507.

Q.
As a result of your review of these various documents as well as your site visits were you able to come to a conclusion with regard to potential development of the property?
A.
Yes.
Q.
What was that conclusion?
A.
Based upon the constraints placed upon the property by the local regulations it would not be possible to construct anything larger than a three thousand square foot building on this site.

§ 16. Description of present zoning of plaintiff's property

Q.
What is the present zoning of the property?
A.
C-1, which is the local commercial zone. This zone permits construction of offices and/or warehouses on sites of four acres or more.
Q.
How large is the plaintiff's property?
A.
Just over six acres.
Q.
Then plaintiff has sufficient land area for construction of an office and/or warehouse on his property?
A.
Yes, as you can see it actually exceeds the lot area requirement of the ordinance.
Q.
Does the zoning ordinance only permit five hundred square feet of commercial space for every acre of land.
A.
On its face the zoning ordinance has a floor area ratio or F.A.R. of twenty percent. Theoretically this means that you can construct a building with a square foot area equal to twenty percent of the square footage of the lot. In this case that would translate into approximately fifty three thousand square feet of building on this lot.
Q.

What then is the basis for your conclusion that only a three thousand square foot building can be constructed on plaintiff's property?

A.

A zoning ordinance can exclude development in two general ways. The most obvious manner of exclusion is through permitted uses in the zoning text and the mapping of those uses. Thus, the ordinance can completely exclude a use by not providing for that use in the text or by failing to map any property for that use. However, this merely excludes specific uses rather than all development. The second manner of excluding development is through the imposition of standards which make it impossible or disproportionately difficult to place an otherwise permitted use on a specific property. In this case we have an example of the second form of exclusion.

Q.

Can you explain what you mean by imposition of standards?

A.

There are two types of standards which could come into play. The first are procedural standards which make it impossible or disproportionately difficult to obtain approvals. This would be a multiplicity of permits and overlapping requirements for hearings documentation etc. which impede the process to such an extent that it becomes burdensome to complete the process due to the time and cost involved in obtaining those approvals. That particular problem does exist in the present case and relates to the time and cost in ultimately completing any construction, but does not relate directly to the size of a structure permitted on site. That problem does, however, relate to the overall economic viability of any project on this site, which I will address later. However, it is the other type of substantive standards which abound in this case and which severely limit the size of any structure which may be placed on the site. Pursuant to section 43 of the zoning ordinance the permitted density is not applied to the entire lot area of six acres, as reflected in the survey of the property, but to an artificial area defined in the ordinance as the "net buildable site area". To determine this net buildable site area the ordinance requires that areas with certain environmental characteristics be deducted from the site area before determining the net buildable site area. Therefore, we must first deduct one hundred percent of all lakes, ponds, watercourses, wetlands, and floodplains. We must then deduct fifty percent of all intermittent drainage ways and steep slopes between 15 and 25 percent. Then seventy five percent of steep slopes of twenty five percent or more must be deducted. Finally, eighty five percent of land with other unique geological features, including mature woodlands must be deducted.

Q.

When you state that land with these various features must be deducted what do you mean?

A.

For example all mature woodland on a site could be cleared and would be buildable. But under the formula in the ordinance, even though this area is buildable, eighty five percent of it must first be deducted from the total land area before computing the Floor Area Ratio. If you had a one hundred thousand square foot lot and all of it was mature woodland you would have to deduct eighty five percent leaving fifteen thousand square feet of lot area against which to compute the floor area ratio. In that case instead of twenty thousand square feet of building in a commercial zone you could only have three thousand square feet of commercial building.

Q.

What causes the reduction in the permitted building size?

A.

It is those standards in the ordinance which reduced the net buildable site so severely as to limit construction to three thousand square feet.

Q.

Can you describe how that came about?

A.

I have a chart here which shows the breakdown of wetlands, floodplain, steep slopes, mature woodlands and so forth. As you can see the net result after making all of the deductions is to reduce the lot area from an actual area of 271,543 square feet to 15,000 square feet of net buildable site area.[The proper foundation should be laid and the chart placed in evidence prior to making reference to it. Depending on the situation it may be helpful to go through such a chart item by item.]

Q.

How do you arrive at a total building of three thousand square feet?

A.

Simply by taking the net buildable site area after making all the deductions and using the floor area ratio of twenty percent against fifteen thousand square feet we arrive at three thousand square feet of building.

Q.

Does the zoning ordinance address the policy behind requiring these deductions?

A.

Yes, section 32 of the ordinance states the purpose is "to ensure protection of important natural features and to protect the environment."

§ 17. Opinion as to reasonableness of zoning requirements

Q.

Do you have an opinion as to whether these are reasonable requirements.

A.

Yes. The stated purpose is a noble one with which no one can reasonably argue. However, the concept of deducting those portions of a site that are environmentally sensitive to some degree, prior to the determination of permitted density is illogical and arbitrary.

Q.

Please explain.

A.

The ordinance has already established minimum lot area standards, floor area ratio, minimum parking, height and other bulk regulations independently of the deductions previously mentioned. In addition there are other requirements which limit the location of structures by precluding construction in wet lands, floodplains and on steep slopes of twenty five percent of more. So long as a site is laid out in conformity with those regulations, provides adequate parking, set backs for the building, access drives and buffer areas, the fact that some portion of the lot which is unutilized anyway is steep or wet or has some other physical characteristic which precludes construction is irrelevant to whether it should be included in the total land area of the site for determining floor area ratio.

Q.

Why is that irrelevant?

A.

If the physical constrains of a lot are great enough they may limit the size of the building anyway. Clearly if there is a great deal of wetland or steep slope this may limit the available area for parking, or access drives, or even a building and thereby limit the size of the building. However, there is no reasonable planning objective in the deductions prior to determining buildable site for a single commercial structure such as that which is permitted in this ordinance.

Q.

Why do you say the deductions are unreasonable?

A.

The deductions do not satisfy any reasonable purpose. The ordinance already excludes all construction in the environmentally sensitive areas and therefore indirectly may limit building size. Since the zoning ordinance established a floor area ratio of twenty percent as reasonable in the C-1 zone there is no reason to further limit building size in that zone. Further, limitation does nothing to protect the sensitive areas as they are already unbuildable and the various regulations provide for minimum setbacks from those areas anyway.

§ 18. Effect of zoning on plaintiff's property development potential

Q.

What purpose, if any, does the deduct requirement serve?

A.

It is in effect a form of exclusionary zoning. Until seven years ago this community was made up of largely vacant land nearly all of which was zoned residential. Only two hundred twenty four acres or one percent of the community's

total land area was zoned for other than single family or farm use. There are two central areas in town which are zoned commercial. The residential communities have grown up around those two areas in the last seven years to the point that ninety five percent of the vacant land within one thousand feet of plaintiff's property has been developed and is occupied by single family residences. Last year after the formation of a local civic association and petition by area residents the town amended the zoning regulations by adding these deduct requirements only on commercial property. This further deduct requirement merely reduces the possibility of any commercial construction in the community.

Q.

In what manner does the deduct requirement reduce commercial development?

A.

Apart from the obvious reduction in the size of buildings, the cost of permitting, as I mentioned before, combined with the reduction in the size of a permitted building makes any construction impossible on, at least, this site. Therefore, while technically commercial development is permitted on this site, practically it is impossible to build an economically viable building.

Q.

Can you explain what you mean by the cost of permitting?

A.

Under state regulations there would be a requirement for this property to undergo an environmental review, in addition, there are local requirements for site plan, wetland permits and board of architectural review. In addition, there is a cost of delay. In my opinion the permitting process would take between eighteen and twenty four months. There is a cost of carrying the property, real estate taxes for example as well as the cost of money used for all of the out of pocket expenses associated with obtaining the permits.

Q.

In your opinion, what would be the permitting cost in this case?

A.

About five to six hundred thousand dollars.

Q.

How did you arrive at that number.

A.

Again, I have prepared a chart of estimated expenses. [After proper foundation the chart should be placed in evidence and utilized in the testimony]. I have estimated that the cost of consultants to prepare all the documentation, permit fees, bonds etc. would exceed five hundred thousand dollars. This takes into account the charges for planners, engineers, surveyors and lawyers to prepare an environmental impact statement in conjunction with the site plan approval and other permits required. Due to the wetlands, flood plain, and other features on the site, in my opinion, the planning commission will require a full environmental impact statement on this project. There are various fees for obtaining permits and there are fees for performance bonds which the Town and State will require. We have about a half mile run of water and sewer line to off site connections which will require a permit from the state to excavate along a state right of way. The State will have substantial requirements in conjunction with this work. Taxes on the property are six thousand dollars annually so that there would be additional taxes to be paid during approval and development.

Q.

What is the net reduction in building size which results from the deductions set forth in the zoning ordinance?

A.

Without the deductions you would have to look at the other physical constraints on the property, resulting from required parking, setbacks from physical features such as wetlands and other code requirements. Using the survey, topographical maps, wetland and floodplain maps, I concluded that without the deduct requirements a building of approximately forty five thousand square feet could be constructed on this site. So there would be a net loss of about forty two thousand square feet of commercial building.

Q.

Thank you.

B. Testimony of Engineer

§ 19. Introductory matters

Q.
Please state your name.
A.
_____.
Q.
By whom are you employed?
A.
_____ Engineering.
Q.
How long have you been employed by _____ Engineering?
A.
Twelve years. [The witness should be fully qualified as to education, degrees, licenses, teaching and other experience including any prior qualification as an expert witness.]

§ 20. Site plan applications for plaintiff's property

Q.
Were you retained by the plaintiff, _____, to assist in determining what could be erected on his property located on _____ Highway, which is the subject of this litigation?
A.
Yes.
Q.
When were you first retained?
A.
About two and half years ago when he first asked that I assist with a site plan application.
Q.
Did you at that time assist in preparing a site plan application?
A.
Yes.
Q.
What was the nature of the proposed site plan?
A.
A forty five thousand square foot building for mixed use office and warehouse.
Q.
Did the building conform to the zoning and other code requirements of the Town and other regulatory agencies?
A.
Yes. The proposal met all code requirements and could have been constructed without any variances.
Q.
Was the site plan approved?
A.
No.
Q.
Why not?
A.
First, the Town imposed a moratorium and then the provisions of the C-1 district in which the property is located were changed to provide for deductions from the site area of wetlands, steep slopes and so forth.
Q.
Did you assist in the preparation of a second site plan after the amendments to the zoning ordinance?

A.

Yes.

Q.

As a result of the amendments to the C-1 district zoning requirements what changes, if any, occurred to the site plain?

A.

As a result of the zoning amendment, instead of a forty five thousand square foot building you could only build a three thousand square foot building on the site.

Q.

Why could you only build a three thousand square foot building?

A.

As a result of the deduct requirements of the new ordinance when you were finished deducting the wetlands, floodplains, steep slopes of twenty five percent and more and the mature woodlands there was only fifteen thousand square feet of site left. Using the F.A.R. of twenty percent that allows only three thousand square feet of building which could be erected.

§ 21. Evaluation of costs to develop plaintiff's property

Q.

There has been some testimony by _____[expert witness planner] concerning certain constraints on the site which she states make it costly to develop this particular site. Can you tell the court if you agree with her evaluation, and, if you do agree, could you describe those features of the site?

A.

I do agree. There are a couple of features of this site which do present construction problems. These problems can be solved, but they add to the expense of development of the site. First there is the location of off-site sewer and water service. Because of the manner in which this area has developed there is no sewer or water service for nearly half a mile. This is a long run of pipe and will have to be done along the state right of way on _____ State Highway. The state requires a lot of safety measures which include flag men and lighted barriers. The state also restricts the hours of operation on the state road so as not to interfere with morning and late afternoon traffic. Therefore the work on this aspect of the project will be very expensive due to the extra men needed and the extra time it will take because of the short work day, as well as the expense of some of the safety measures. This added to the cost of running that much pipe makes this part of the project inordinately expensive.

Q.

Does the expense of the sewer and water lines in any way relate to the size of the building constructed?

A.

Not in this case. Since you are digging up the state road and there is the possibility that other people may want to hook up to that line later on we would be mandated to put in the same size pipe no matter what because the Town and the state want the extra capacity so that the road will not have to be dug up again. One of the problems is that _____[the owner] will be providing access to water and sewer for everyone who comes along later to build on that stretch of _____ State Highway.

Q.

Are there any other aspects of the site which add to the expense of construction regardless of the size of the building to be constructed?

A.

Yes. Because of the way the property slopes down toward the road, it is necessary to set the parking areas and building pretty far back on the site where it is more level. This requires a longer access drive to the building and parking areas. Also the slopes which are mostly near the road frontage require some cut and fill to provide access which will add to the cost of construction. These costs are all fixed costs which are there regardless of the size of the building constructed.

Q.

Thank you.

C. Testimony of Appraiser

§ 22. Introductory matters

Q.
Please state your name.
A.
_____.
Q.
What is your occupation?
A.
I am a real estate appraiser.
Q.
By whom are you employed?
A.
_____ Realty Appraisers, Inc.[The witness should then be qualified as an expert setting forth education, experience, teaching, published writings and familiarity and experience with the geographic area in which the subject property is located. In addition, prior testimony as an expert witness should be noted.]

§ 23. Appraisal of plaintiff's property

Q.
Did you prepare an appraisal of the premises at issue?
A.
Yes.[After laying the appropriate foundation the appraisal should be placed in evidence.]
Q.
Did you come to a conclusion as to the value of the property as presently zoned?
A.
Yes.
Q.
What was your conclusion?
A.
Based upon my evaluation of the property, taking into consideration three comparable properties, the zoning code restrictions and what can be built on the site, I am of the opinion that no one would purchase the property in an arms length transaction. If a building were constructed on the property it could not generate sufficient rental income to offset the cost of construction, and property taxes nor could it be sold for a sum which would equal the cost of construction. Therefore, it is my opinion that as presently zoned, the land has no economic value.
Q.
Can you describe the approach you used in undertaking this appraisal?
A.
Yes, as vacant land it has no value. Its only value is its potential value for development.
Q.
Can you explain what you mean by development potential?
A.
The property is subject to zoning requirements. The zoning of the property permits only limited uses, which are offices and/or warehouses and accessories to those uses such as parking and loading spaces. As vacant land it cannot be used for anything. Therefore, when someone looks at this property as a potential purchaser, they can only look at it from the perspective of what can be done with the property, its development potential. If the zoning permits one hundred thousand feet of office space, then that is its development potential. Generally, the potential to build one hundred thousand square feet of office has a greater value than the potential to build ten thousand square feet of office

space. It is that potential which drives the value of the property.

Q.

What approach did you use in arriving at a value for the property in question?

A.

I used the market data approach which is a process by which you take sales of similar properties, adjust those properties for any differences between those properties and the subject property to arrive at a sales price for which the property would have sold had it contained all of the salient and important characteristics of the subject property. Then I correlated those adjusted sales prices into a statement of the market value of the subject property. In this case, since the planning consultant has concluded that approximately three thousand square feet of commercial building can be constructed on site, I looked at properties with similar zoning that had buildings of approximately three thousand square feet. Of the three comparables number one had two thousand nine hundred square feet, number two had three thousand five hundred square feet and number three had four thousand square feet.

Q.

You used the term market value. What do you mean by that term?

A.

The most probable price in terms of money only which a specific property interest should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently, knowledgeable and assuming the price is not affected by undue stimulus.

Q.

What do you mean by undue stimulus?

A.

Undue stimulus could be a number of factors, such as a relationship between the parties which might cause an artificially high price.

Q.

Did you inspect the subject property?

A.

Yes, I did.

Q.

Did you review any other information regarding the property?

A.

Yes, I reviewed the local zoning code and other local land regulations and I reviewed the report of _____[expert witness planner] who described the full permitting procedure and permissible construction on the site and the report of the engineer, _____.

Q.

Did you also inspect the comparables referred to by you?

A.

Yes, at the time of preparation of my report I inspected each of the comparables. I took into consideration the location, and general condition of each of the comparables, as well as other market data.

Q.

In addition to site inspections did you review any other information with regard to the comparables?

A.

Yes, I reviewed the tax records in the assessors office for each comparable. In addition to assessment information, this included sales records.

§ 24. Cost of development

Q.

Can you tell the court the characteristics of the subject property which you considered in reaching your conclusions?

A.

The property was purchased six years ago for a price of one hundred twenty thousand dollars in an arms length

transaction. At the time it was zoned C-1, but the present requirements of deducting woodlands, steep slopes, wetlands etc. in calculating the net buildable site were not yet adopted. Thus, the property was capable of supporting a building of up to fifty three thousand square feet. In reviewing the report of the planning consultant I noted that with the deduct requirements of the amended ordinance it is now possible to build a building of only approximately three thousand square feet. The building could contain office or warehouse space or a combination of the two in a ratio of two to one with the major portion being warehouse. My examination of market data reveals that at the present time, and for the foreseeable future, the market for mixed use office, warehouse buildings is stronger in this area than either office use or warehouse use alone. In addition, the planning consultant's report notes that, due to the topography of the property and the location of utilities off site it would be relatively expensive to construct the infrastructure on the site. Finally, the planning consultant fixes the cost of obtaining approvals for the various permits, including environmental reviews at about half a million dollars. Based upon current construction data it is estimated that the cost of construction including the permit approvals and installation of infrastructure woul d be nine hundred sixty thousand dollars.

Q.

Is it your testimony that it would cost four hundred and sixty thousand dollars to construct a three thousand square foot building?

A.

Yes, again you must take into consideration the extensive site problems. As _____[expert witness planner] noted, the location of steep slopes and wetlands makes placement of the structure and required parking on a portion of the site which will require a greater access drive. The location of sewer and water nearly a half mile from the site requiring excavating along a half mile of state right of way will be very expensive not only as a result of the long run of pipes, but because of state requirements for safety measures when working along the right of way, such as flag men, barriers and so forth all of which increases the costs.

Q.

Do a lot of these costs relate to the size of the building?

A.

No. At least a third of the construction cost and all of the permitting cost are pretty much fixed costs that you would have with the building even if it was fifty thousand square feet. You must still go through the environmental review described by _____[expert witness planner] and as the engineer noted, the off site piping is the same for a three thousand square foot building as it is for a fifty three thousand square foot building.

Q.

In reviewing your comparables you used several factors in considering adjustments what are those?

A.

The first factor is location. A comparable one, I felt, was in a better location because there is a much denser population. This generally would draw higher rents because of the greater need in such an area for office space and the general lack of availability of warehouse space. Likewise comparable number two has a better location because it is also on a state highway, but is closer to the interchange with the interstate and therefore is more attractive for warehousing where materials are trucked in. Accessibility is a primary factor for this type of use. The third comparable, on the other hand had much worse accessibility and therefore did not have as high a factor for location.

Q.

What is the next factor you considered?

A.

Basically the size and quality of the improvements. As I already stated the three comparables were all fairly close to three thousand square feet with number three at four thousand square feet having the greatest deviation. I adjusted for size in my calculations. But in addition to size it is necessary to consider the condition of the properties. Number three was not only the largest, but it was also the oldest of the structures, the parking lot needs some repair and based on its age the roof and the heating system are near their maximum life. Number one was built last year and sold shortly after construction. Number two was built five years ago and is in good overall condition.

Q.

Do you have financial data on the comparables?

A.

Yes, as I said number one is new and was sold last year. It is in an adjoining town on a little more than an acre. It has the same parking and set back requirements as the subject premises, but not the same deduct requirements. In an

arms length sale it sold for four hundred thousand dollars. Adjusted for inflation the price today would be four hundred and fifteen thousand dollars. Number two is located in the same town as the subject property and sold three years ago for three hundred and sixty thousand dollars. Adjusted for inflation and depreciation the value today would be roughly the same. Number one has no recent sale, but according to rental information I was able to obtain, it generates a rental income of thirty two thousand dollars with real estate taxes of twelve thousand dollars. However, all of the leases are net, net, net. Thus, in my opinion, in today's market, it would sell for approximately two hundred ninety five thousand dollars.

Q.

Based on your financial analysis do you have an opinion on the value of the subject parcel if the maximum potential construction was done on the site?

A.

Yes, taking into consideration size, location, and condition of the properties I am of the opinion that in an arms length transaction a buyer would purchase the subject property with a new three thousand square foot building for combined office and warehouse use for no more than three hundred sixty five thousand dollars.

Q.

Do you have an opinion as to whether it is economically feasible to develop the subject property?

A.

Yes I have an opinion.

Q.

What is that opinion?

A.

It would not be feasible.

Q.

Please explain your response.

A.

Quite simply the cost of development would exceed the price which could be obtained for the property in a sale. The sale price is a reflection of the potential rental income from the property. Assuming even an average rate of ten dollars a square foot, which is high for this type of use in this area, the annual rent roll would be thirty thousand dollars per year. A gross income of thirty thousand dollars would not cover the cost of borrowing money to construct the improvements or the cost for someone else to purchase the property once it was improved. Nor for that matter would a bank be likely to make a loan on this property for a price sufficient to cover the cost of development, which is almost three times its market value, even assuming someone would want to pay such a price. Quite simply the cost of development is far in excess of any potential value of the property, once it is developed.

Q.

Is there any other use which could be made of the property?

A.

No. The zoning only permits those limited commercial uses. Even if you wanted to camp on it, technically you cannot.

Q.

Does the property have any value?

A.

No, not as presently zoned. The cost of development exceeds its value for sale or the rental which could be realized for carrying the development costs if the property owner wanted to sell the property. The zoning restricts the property to uses which cannot be feasibly developed and absent such development the zoning does not permit any other use. Therefore, no one would purchase the property because there is nothing that can be done with it. One of the definitions of value is present worth of a future benefit. If the property had development potential there would be a present worth to the property even without it being developed. Absent that development potential there is no present worth to the property.

Q.

Can you explain that a little more?

A.

As I stated earlier the market value of a property is a function of its development potential. Based upon the es-

timates of the planning consultant it would cost over nine hundred thousand dollars to develop this site for the maximum permitted use. Therefore, the development potential of this property is a three thousand square foot building. Such a building could generate a gross income of maybe thirty thousand dollars a year. It makes no sense for anyone to expend close to a million dollars to generate a gross income of thirty thousand dollars which will generate a net income after real property taxes, and operating costs of close to that amount before we even discuss debt service. Therefore, the property really has no development potential and therefore has no present worth.

Q.

Thank you.

D. Testimony of Property Owner

§ 25. Introductory matters

[Cumulative Supplement]

Q.

Please state your name.

A.

_____.

Q.

Are you the owner of the property located on _____ State Highway which is the subject of this litigation?

Q.

Yes.

Q.

Are you the sole owner?

A.

Yes.

Q.

Can you tell us a little bit about your background?

A.

Yes. I have a B.A. in accounting from Columbia University. After graduation I went to work for an accounting firm and began by auditing some large real estate development companies. As a result I became interested in real estate development and became involved in a couple of small projects. After a year or two I quit accounting and went into real estate development full time. I have been in the business now for twenty three years. Over that time I have been involved in a number of commercial, industrial, and residential developments. However, the bulk of my experience has been in developing office and warehouse uses. I am half owner of the _____ Industrial Park in _____[Town], which is a mixed use office and warehouse development containing five hundred thousand square feet of office and warehouse space. In addition, I either own outright or in conjunction with others another nine hundred thousand square feet of commercial space and two small apartment complexes.

CUMULATIVE SUPPLEMENT

Trial Strategy

Landowner's Evidence of Market Value in Eminent Domain Proceeding, 60 Am. Jur. Trials 447

[Top of Section]

[END OF SUPPLEMENT]

§ 26. Purchase of property

Q.

Please tell the court when you purchased the property which is the subject of this action.

A.

Six years ago.

Q.

From whom did you purchase the property?

A.

_____.

Q.

Did you know _____[seller] prior to purchasing the property in question?

A.

No.

Q.

How did you meet _____[seller]?

A.

I was looking for an investment in this area in order to become involved in some commercial development. There was very little commercial development locally at the time and a lot of vacant land around. I went to _____ Real Estate Brokerage and inquired about the availability of commercially zoned property in this general area. Mr. _____ of the brokerage showed me several properties including this one.

Q.

What attracted you to this particular property?

A.

The location is a good one. It has direct access on _____ State Highway and is close to the interstate, as well as several other major highways. At the time the zoning was excellent, and most of the area around it was vacant, so I felt there would not be a great deal of neighborhood opposition to construction.

Q.

What was the zoning of the property?

A.

C-1, commercial which permits office and/or warehouse development.

Q.

How did you arrive at a purchase price?

A.

The price was negotiated. _____[seller] was looking for one hundred forty thousand dollars which is not an unreasonable price for roughly six acres of land. However, I did some investigating and found that because of the topography of the property there were some constraints that would increase the cost of development.

Q.

What were those constraints?

A.

Due to the location of slopes, wetlands and floodplain areas, any building and parking area would have to be located in such a manner that would require a long access drive. In addition, the location of water and sewer service off site required a run of almost half a mile along _____ State Highway. The cost of running pipe that distance and the permitting requirements from the State Highway Department all added to the cost of construction. In addition, the slopes, wetlands and floodplains in conjunction with the set back requirements somewhat limited to size of a building which could be constructed on the site.

Q.

When you state that the various constraints somewhat limited the size of the building permitted on the site can you explain what you mean?

A.

Yes. The zoning ordinance, at that time, permitted a building with a total square foot area equal to twenty percent of the square foot area of the lot. This is known as the floor area ratio or F.A.R. Based purely on the area of the lot you could build approximately fifty three thousand square feet of building on this site. If you take into account the fact that

the ordinance prohibits construction on steep slopes of twenty five percent or more, in wetlands and floodplains and further requires that any construction be set back from those areas, the actual building size shrinks down a bit.

Q.

How much does the building size shrink?

A.

In this case, we did not do a full detailed building scenario prior to purchase. However, my planner and engineer looked at the site. Based on their estimates I was operating under the assumption, when I negotiated the purchase price that I could put up a building of between forty and forty five thousand square feet.

Q.

What was the purchase price?

A.

One hundred twenty thousand dollars.[The deed and proof of the purchase price should be placed in evidence with this witness.]

Q.

How did you arrive at that number?

A.

As I stated it was negotiated. _____[Seller] wanted one hundred forty thousand dollars and I felt that since I might only be able to build a building of forty thousand to forty five thousand square feet, even though the property was six acres, I had to take into account the cost of development and the return I could expect on a smaller building. So we negotiated down to one hundred twenty thousand dollars.

Q.

What was your basis for agreeing to pay one hundred twenty thousand dollars?

A.

The expectation that I could build a commercial building on the site of at least forty thousand square feet and perhaps slightly larger. Also based upon the other costs of development, including the off site sewer and water, I believed that one hundred twenty thousand dollars was a reasonable price to pay for the property and still permit me the ability to obtain a fair return on my investment.

§ 27. Plans to develop property

Q.

Did you undertake development immediately after purchase?

A.

No.

Q.

Why not.

A.

By the time we had finished negotiating and closed on the property I was in the middle of another project and had to put this site on hold. Then I ran into a financing problem with my bank which caused a further delay. Finally, about two years ago I began to make preliminary submission for site plan and the other approvals required.

Q.

What was the size of the building you submitted for site plan approval?

A.

Forty five thousand square feet.

Q.

Did the proposal require any variances from the zoning ordinance?

A.

No. The plan met all of the zoning and other code requirements of the Town.

Q.

What happened when you submitted your site plan application?

A.

The Town planner rejected it stating that we needed more detail. The plans were revised and resubmitted within a month. Those plans were rejected also, this time there were additional items requested which were not requested on the first submission. We revised the plans again and submitted a third time.

Q.

Then what happened?

A.

The planning commission scheduled a hearing on my application, but two days before the scheduled hearing the Town Board adopted a six month moratorium on all development and approvals in the C-1 district pending a study of the zoning requirements of that district.

Q.

What happened to your site plan application?

A.

At that point I went to the planning commission meeting, as scheduled, but I was told that in view of the moratorium the planning commission would not hear my application. I brought a lawsuit challenging the moratorium, but the zoning was modified and the moratorium ended before I could get a decision on my challenge to the moratorium and the court dismissed my action as moot.

§ 28. Zoning modification

Q.

You stated that the zoning was modified, when and how was it modified?

A.

About four months into the moratorium the Town Board voted an amendment to the C-1 Zone which created the net buildable site provision. This set forth a list of deductions for wetlands, floodplains, steep slopes and other natural features such as mature woodlands before arriving at the net buildable site.

Q.

How does this differ from the old ordinance?

A.

Under the old ordinance you could not build in certain of those areas, but you could count them in determining the size of the building you could erect by applying the twenty percent F.A.R. to the total site. Now you have to deduct all of those areas I listed and then apply the F.A.R. to what is left, which is called the net buildable site.

Q.

As a result of this new amendment what is the size of the building you can erect on the site?

A.

Approximately three thousand square feet.

Q.

Have you built anything on the site?

A.

No.

Q.

Why have you not erected anything on site?

A.

I have analyzed the cost of obtaining the permits, constructing the improvements, both on and off site and believe that I could not recoup the cost of construction with a building on that site.

Q.

It would seem that if you build a smaller building it would cost less and therefore you would not need as much profit.

A.

That only works to a point. In this case there are certain fixed costs which you have regardless of the size of the building. Those costs include all of the fees and expenses in going through the site plan and other approval processes. In addition, as I mentioned water and sewer is far from the site and the cost of running those lines remains almost

exactly the same with whatever size building you have. The only variation might be the diameter of pipe and in this case that is not even a variable. All of those costs, which are considerable, remain the same regardless of the building size and so you just have a smaller building to support a lot of the same costs.

Q.

What, if anything have you done with the property since the amendment to the zoning ordinance?

A.

First, I applied for a variance which was denied by the zoning commission.

Q.

What kind of variance did you request?

A.

I applied for an area variance which would have allowed a thirty thousand square foot building.

Q.

Why did you apply for a thirty thousand square foot building?

A.

Based upon the financial data I put together it was my conclusion that thirty thousand square feet is the absolute minimum building I can build and have anything close to an economically viable project.

Q.

What do you mean by economically viable?

A.

I can just about break even.

Q.

What happened to that application?

A.

It was denied. I appealed to the courts and the zoning commission decision was upheld.

Q.

Have you attempted to do anything else with the property?

A.

Yes. I placed it on the market even before I applied for the variance.

Q.

What was the offering price?

A.

I set the price at sixty thousand dollars which is half of what I paid for it.

Q.

Has there been any interest in the property?

A.

There has been of lot of interest at that price. However, as soon as someone investigates the zoning they lose interest.

Q.

Has anyone offered you anything for the property?

A.

Not a cent. I have spoken to several of the people who looked at the property and asked them to make some offer and they would not offer anything.

Q.

Thank you.

E. Testimony of Real Estate Agent

§ 29. Introductory matters

Q.

Please state your name.

A.

_____.

Q.

By whom are you employed?

A.

_____ Real Estate Brokerage.

Q.

How long have you been employed by _____[real estate brokerage]?

A.

Since I started the company seventeen years ago.

Q.

Do you hold any licenses or certificates?

A.

Yes. I hold a real estate broker's license from the state. In order to obtain the license I had to complete an accredited training program.

§ 30. Familiarity with plaintiff's property and affect of zoning changes

Q.

Were you retained by the plaintiff to sell his property on _____ State Highway which is the subject of this action?

A.

Yes.

Q.

When were you retained?

A.

About a year ago shortly after the Town changed the requirements for the C-1 zone.

Q.

Did you have any familiarity with the property prior to plaintiff's listing of the property with you?

A.

Yes. I had been the broker when he purchased the property.

Q.

Do you recall the purchase price when the property was acquired by the plaintiff?

A.

Yes. It was one hundred twenty thousand dollars.

Q.

When did the plaintiff purchase the property?

A.

About six years ago.

Q.

What was the listing price when the plaintiff put the property on the market approximately a year and a half ago.

A.

Sixty thousand dollars.

Q.

Are you familiar with commercial real estate prices in this area over the last six years.

A.

I would say so. My company is the largest brokerage in the county. We have been involved in approximately ninety percent of the commercial sales in the county over the last ten years.

Q.

In the last six years has the value of commercial real estate followed a trend?

A.

Yes, with the exception of a few parcels that have depreciated due to adverse local problems such as the closing of an interchange which made the location less accessible, commercial property values are up today over what the were six years ago.

Q.

If you know, can you tell the court the reason for the listing of this property at sixty thousand dollars when it was purchased for one hundred twenty thousand dollars six years ago.

A.

The zoning.

Q.

Would you please explain what you mean?

A.

Six years ago when _____[plaintiff] purchased the property from _____[seller] it looked like a building of about fifty thousand square feet could be built on the site. In fact, the listing indicated that up to fifty three thousand square feet could be built on the site. I understand it was actually a little smaller, but I am not certain how much smaller. When _____[plaintiff] came to list the property a year and half ago he advised me that he had to list it for sixty thousand dollars because the zoning amendments prevented him from building more than three thousand square feet on the site. I could not believe that so I check with the building inspector of the town, Mr. _____. He agreed that three thousand square feet was about right.[This statement may be objectionable; however, it is assumed the building inspector will be called as a witness.]

Q.

Did you have an exclusive listing?

A.

No. _____[plaintiff] had it with a couple of brokers.

Q.

What did you do to market the property?

A.

We put up a sign on the site. We ran ads in the local papers and some real estate trade journals that run both state wide and regionally.

Q.

Was there any interest in the property?

A.

Initially there was a lot of interest. We were offering six acres of commercial land for sixty thousand dollars, that was cheap.

Q.

You said initially there was interest. What happened?

A.

Well, once people came to check the site out they ran in the other direction.

Q.

What do you mean?

A.

The site has some problems with access and the sewer and water. When people looked at the costs of site work and utilities they said they were not interested in this parcel if they could only build a three thousand square foot building.

Q.

Were any offers made?

A.

No. I got to the point, at _____[plaintiff]'s request, where I told people who came out to look at it that the owner was anxious to sell and would entertain any offer. No one would make an offer.

Q.

Thank you.

IV. Bibliography

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Editor's Comment:

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Section 1 Footnotes:

[FN1] For a look at the early days of zoning in America, see Bassett, E., Zoning Laws, Administration and Court Decisions During the First Twenty Years (1936).

[FN2] Euclid v Ambler Realty Co. (1926) 272 US 365, 71 L Ed 303, 47 S Ct 114, 4 Ohio L Abs 816, 54 ALR 1016.

[FN3] Euclid v Ambler Realty Co. (1926) 272 US 365, 71 L Ed 303, 47 S Ct 114, 4 Ohio L Abs 816, 54 ALR 1016.

Section 2 Footnotes:

[FN4] Justice Holmes opted for a balancing test, stating that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Pennsylvania Coal Co. v Mahon (1922) 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321.

[FN5] Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226; Agins v Tiburon (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138, 14 Envt Rep Cas 1555, 10 ELR 20361; Williamson County Regional Planning Com. v Hamilton Bank of Johnson City (1985) 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108, on remand (CA6 Tenn) 779 F2d 50; MacDonald, Sommer & Frates v County of Yolo (1986) 477 US 340, 91 L Ed 2d 285, 106 S Ct 2561, 16 ELR 20807, reh den 478 US 1035, 92 L Ed 2d 773, 107 S Ct 22; Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300; Nollan v California Coastal Com. (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141, 26 Envt Rep Cas 1073, 17 ELR 20918; First English Evangelical Lutheran Church v County of Los Angeles (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378, 26 Envt Rep Cas 1001, 17 ELR 20787; Lucas v South Carolina Coastal Council (1992, US) 120 L Ed 2d 798, 112 S Ct 2886, 92 Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297.

[FN6] Although several factors have been utilized to determine when a land use regulation results in a "taking" of property, "... the Supreme Court has characterized the analytic process as one relying instead on ad hoc, factual inquiries into the circumstances of each particular case...."; Loveladies Harbor, Inc. v United States (1990) 21 Cl Ct 153, 31 Envt Rep Cas 1847, 20 ELR 21207. See also Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300. Accord Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226.

[FN7] The Fourteenth Amendment to the Constitution states: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Const Amendment XIV. The Fifth Amendment states: "No person shall be ... de-

prived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation." US Const. Amendment V.

[FN8] Chicago, B. & Q. R. Co. v Chicago (1897) 166 US 226, 41 L Ed 979, 17 S Ct 581.

[FN9] State constitutions also contain due process and taking clauses, and form the basis for state claims for just compensation.

[FN10] The owner is generally entitled to just compensation calculated according to the property's fair market value based on the property's highest and best use unaffected by the intended condemnation. United States v Miller (1943) 317 US 369, 87 L Ed 336, 63 S Ct 276, 147 ALR 55, reh den 318 US 798, 87 L Ed 1162, 63 S Ct 557. See also Olson v United States (1934) 292 US 246, 78 L Ed 1236, 54 S Ct 704.

[FN11] Loretto v Teleprompter Manhattan CATV Corp. (1982) 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164, 8 Media L R 1849, on remand 58 NY2d 143, 459 NYS2d 743, 446 NE2d 428, later proceeding (1st Dept) 135 App Div 2d 444, 522 NYS2d 543, app den 71 NY2d 802, 527 NYS2d 768, 522 NE2d 1066 and cert den 488 US 827, 102 L Ed 2d 55, 109 S Ct 78, finding a per se taking where a New York statute required that landlords allow installation of wiring across their premises for cable television hook-ups.

[FN12] See §§ 9– 10.

[FN13] See § 7.

[FN14] See § 8. This three-part test was originally established by the landmark case of Pennsylvania Coal Co. v Mahon (1922) 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321; and later elaborated on in Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226.

[FN15] Loveladies Harbor, Inc. v United States (1990) 21 Cl Ct 153, 31 Envt Rep Cas 1847, 20 ELR 21207 and motion den, remanded (CA FC) 27 F3d 1545, 24 ELR 20938 and affd (CA FC) 28 F3d 1171, 38 Envt Rep Cas 1867, 24 ELR 21072, reh, en banc, den (CA FC) 1994 US App LEXIS 28462.

[FN16] See San Diego Gas & Electric Co. v San Diego (1981) 450 US 621, 655–656, n. 22, 67 L Ed 2d 551, 101 S Ct 1287, 11 ELR 20345 ("If all else fails, merely amend the regulation and start over again.").

[FN17] First English Evangelical Lutheran Church v County of Los Angeles (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378, 26 Envt Rep Cas 1001, 17 ELR 20787, and on remand, (2nd Dist) 210 Cal App 3d 1353, 258 Cal Rptr 893, 19 ELR 21329, mod, reh den (Cal App 2nd Dist) 1989 Cal App LEXIS 639 and review den (Cal) 1989 Cal LEXIS 4224 and cert den 493 US 1056, 107 L Ed 2d 950, 110 S Ct 866.

[FN18] See § 12.

Section 3 Footnotes:

[FN19] Williamson County Regional Planning Com. v Hamilton Bank of Johnson City (1985) 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108, on remand (CA6 Tenn) 779 F2d 50.

[FN20] 473 US at 192–93 (citations omitted).

[FN21] See §§ 6– 8.

[FN22] Bakken v Council Bluffs (1991, Iowa) 470 NW2d 34; Port Clinton Assoc. v Board of Selectmen (1991) 217 Conn 588, 604, 587 A2d 126, cert den 502 US 814, 116 L Ed 2d 39, 112 S Ct 64; see also MacDonald, Sommer & Frates v County of Yolo (1986) 477 US 340, 348-349, 91 L Ed 2d 285, 106 S Ct 2561, 16 ELR 20807, reh den 478 US 1035, 92 L Ed 2d 773, 107 S Ct 22; Agins v Tiburon (1980) 447 US 255, 260, 65 L Ed 2d 106, 100 S Ct 2138, 14 Envt Rep Cas 1555, 10 ELR 20361; Williamson County Regional Planning Com. v Hamilton Bank of Johnson City (1985) 473 US 172, 186, 87 L Ed 2d 126, 105 S Ct 3108, on remand (CA6 Tenn) 779 F2d 50; Hodel v Virginia Surface Mining & Reclamation Asso. (1981) 452 US 264, 297, 69 L Ed 2d 1, 101 S Ct 2352, 16 Envt Rep Cas 1027, 11 ELR 20569. See also Brecciaroli v Connecticut Comm'r of Environmental Protection (1975) 168 Conn 349, 362 A2d 948, 5 ELR 20319; Vartelas v Water Resources Com. (1959) 146 Conn 650, 153 A2d 822.

[FN23] Huck v Inland Wetlands & Watercourses Agency (1987) 203 Conn 525, 525 A2d 940; Gil v Inland Wetlands & Watercourses Agency (1991) 219 Conn 404, 593 A2d 1368 (wetlands status of a portion of the property should have warned the plaintiff that development would be difficult and that repeated applications might be necessary before the agency would approve an application for a building permit).

[FN24] Williamson County Regional Planning Com. v Hamilton Bank of Johnson City (1985) 473 US 172, at 194–5, 87 L Ed 2d 126, at 144, 105 S Ct 3108, at 3120–21.

[FN25] Austin, 840 F2d at 682.

[FN26] See, e.g., Connolly v Dallas County (1991, Iowa) 465 NW2d 875; Scott v Sioux City (1988, Iowa) 432 NW2d 144.

[FN27] See Ochoa Realty Corp. v Faria (1987, CA1 Puerto Rico) 815 F2d 812 (where Puerto Rico recognized availability of common law inverse condemnation claim, property owner's taking claim in federal court held not ripe until owner had first brought suit in Puerto Rico courts); accord Littlefield v Afton (1986, CA8 Minn) 785 F2d 596, 4 FR Serv 3d 1129.

[FN28] See Naegele Outdoor Advertising v Durham (1992, MD NC) 803 F Supp 1068, affd without op (CA4 NC) 19 F3d 11, reported in full (CA4 NC) 1994 US App LEXIS 3531 and cert den (US) 130 L Ed 2d 278, 115 S Ct 317 (even if Naegele were required to apply for just compensation in order to make its claim mature, ... there is little likelihood that it would have prevailed in light of North Carolina court decisions finding no compensation due when a challenged ordinance contained an amortization period).

[FN29] See Fields v Sarasota Manatee Airport Authority (1992, CA11 Fla) 953 F2d 1299, 1303-09, 6 FLW Fed C 43.

[FN30] See, e.g., Orion Corp. v State (1987) 109 Wash 2d 621, 747 P2d 1062, 18 ELR 20697, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1996. Unlike permit denials, the action of a local agency involving a zoning change thereby establishes a final authoritative decision that affects a landowner. See D'Addario v Planning & Zoning Com. (1991) 25 Conn App 137, 593 A2d 511.

[FN31] Hoffman v Inland Wetlands Com. (1992) 28 Conn App 262, 610 A2d 185, app den 223 Conn 925, 614 A2d 822 (rejection of the plaintiffs' application for a permit does not imply that less ambitious plans would also be denied).

[FN32] Answers to these questions depend upon the application of Williamson County Regional Planning

Com. v Hamilton Bank of Johnson City (1985) 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108, on remand (CA6 Tenn) 779 F2d 50 in particular cases. See Gilbert v Cambridge (1991, CA1 Mass) 932 F2d 51, cert den 502 US 866, 116 L Ed 2d 153, 112 S Ct 192, reh den 502 US 1051, 116 L Ed 2d 820, 112 S Ct 922 (adopting Ninth Circuit's one meaningful application and denial rule).

[FN33] Williamson County Regional Planning Com. v Hamilton Bank of Johnson City (1985) 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108, on remand (CA6 Tenn) 779 F2d 50.

[FN34] MacDonald, Sommer & Frates v County of Yolo (1986) 477 US 340, 352 & n 8 91 L Ed 2d 285, 106 S Ct 2561, 16 ELR 20807, reh den 478 US 1035, 92 L Ed 2d 773, 107 S Ct 22.

[FN35] Kirby Forest Indus. v United States (1984) 467 US 1, 81 L Ed 2d 1, 104 S Ct 2187, 39 FR Serv 2d 929, on remand sub nom United States v 2175.86 Acres of Land (ED Tex) 635 F Supp 705, later proceeding (ED Tex) 687 F Supp 1079. Compare Burlington N. R. Co. v United States (1985, CA FC) 752 F2d 627 (taking claim dismissed without prejudice because owner failed to apply for permit and government argued permit could be granted if sought) with Whitney Ben., Inc. v United States (1989) 18 Cl Ct 394, 40720 ELR 20610, corrected 20 Cl Ct 324 and affd (CA FC) 926 F2d 1169, 32 Envt Rep Cas 1768, 21 ELR 20806, 115 OGR 180, reh den (CA FC) 1991 US App LEXIS 5364, reh, en banc, den (CA FC) 1991 US App LEXIS 9802 and cert den 502 US 952, 116 L Ed 2d 354, 112 S Ct 406, 33 Envt Rep Cas 1960, later proceeding 25 Cl Ct 232, 37 CCF ¶76270, motion gr 30 Fed Cl 411, 1994 US Claims LEXIS 29, motion for new trial denied, motion den 31 Fed Cl 116, 1994 US Claims LEXIS 90 (taking occurred upon enactment of regulatory statute because it would have been futile to apply for a permit and effect of statute was to preclude all economically viable use).

[FN36] Presbytery of Seattle v King County (1990) 114 Wash 2d 320, 787 P2d 907, 21 ELR 21010, cert den 498 US 911, 112 L Ed 2d 238, 111 S Ct 284.

[FN37] See Estate of Friedman v Pierce County (1989) 112 Wash 2d 68, 768 P2d 462.

[FN38] A presumption favoring the requirement that administrative remedies be exhausted exists, based on the following policies: (1) to insure against premature interruption of the administrative process, (2) to allow the agency to develop the necessary factual background on which to base a decision, (3) to allow the exercise of agency expertise, (4) to provide a more efficient process and allow the agency to correct its own mistake, and (5) to ensure that individuals are not encouraged to ignore administrative procedures by resort to the courts. Orion Corp. v State (1985) 103 Wash 2d 441, 693 P2d 1369, 22 Envt Rep Cas 1057, appeal after remand, en banc 109 Wash 2d 621, 747 P2d 1062, 18 ELR 20697, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1996.

Section 4 Footnotes:

[FN39] Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226.

[FN40] However, the Supreme Court has recently questioned this "parcel as a whole" analysis stating that where a regulation "requires a developer to leave 90 percent of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in the value of the tract as a whole." Lucas v South Carolina Coastal Council (1992, US) 120 L Ed 2d 798, 112 S Ct 2886, 2894 n 792, Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297.

[FN41] See, e.g., Beard v South Carolina Coastal Council (1991) 304 SC 205, 403 SE2d 620, 22 ELR 20036, cert den 502 US 863, 116 L Ed 2d 146, 112 S Ct 185; Tabb Lakes, Inc. v United States (1992) 26 Cl Ct 1334, 23 ELR 20104, affd (CA FC) 10 F3d 796, 38 Envt Rep Cas 1179, 24 ELR 20169; Orion Corp. v State (1987) 109 Wash 2d 621, 747 P2d 1062, 18 ELR 20697, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1996; State v Lake Lawrence Public Lands Protection Asso. (1979) 92 Wash 2d 656, 601 P2d 494, 10 ELR 20849, app dismd 449 US 802, 66 L Ed 2d 5, 101 S Ct 46 and cert den 449 US 830, 66 L Ed 2d 35, 101 S Ct 98.

Section 5 Footnotes:

[FN42] See, e.g., Presbytery of Seattle v King County (1990) 114 Wash 2d 320, 787 P2d 907, 21 ELR 21010, cert den 498 US 911, 112 L Ed 2d 238, 111 S Ct 284; Nollan v California Coastal Com. (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141, 26 Envt Rep Cas 1073, 17 ELR 20918.

[FN43] See Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300.

[FN44] Orion Corp. v State (1987) 109 Wash 2d 621, 747 P2d 1062, 18 ELR 20697, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1996.

[FN45] See § 3.

[FN46] See § 7.

[FN47] See § 8.

[FN48] See §§ 9– 10.

[FN49] Orion Corp. v State (1987) 109 Wash 2d 621, 747 P2d 1062, 18 ELR 20697, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1996; First English Evangelical Lutheran Church v County of Los Angeles (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378, 26 Envt Rep Cas 1001, 17 ELR 20787, and on remand, (2nd Dist) 210 Cal App 3d 1353, 258 Cal Rptr 893, 19 ELR 21329, mod, reh den (Cal App 2nd Dist) 1989 Cal App LEXIS 639 and review den (Cal) 1989 Cal LEXIS 4224 and cert den 493 US 1056, 107 L Ed 2d 950, 110 S Ct 866.

[FN50] See § 12.

[FN51] See, e.g., Sobel v Higgins (1992, 1st Dept) 188 App Div 2d 286, 590 NYS2d 883, app dismd without op 81 NY2d 953, 597 NYS2d 938, 613 NE2d 970 and app den 82 NY2d 655, 602 NYS2d 804, 622 NE2d 305.

[FN52] See, e.g., Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v New York (1990, CA2 NY) 914 F2d 348 (limiting modification or alteration of structures with special historic, architectural or cultural significance substantially advanced by city's landmark preservation scheme), cert den 499 US 905, 113 L Ed 2d 214, 111 S Ct 1103; Historic Albany Foundation, Inc. v Coyne (1990, 3d Dept) 159 App Div 2d 73, 558 NYS2d 986 (ordinance requiring authorization for major alterations, demolition, or new construction of buildings in protected historic districts substantially advanced goal of historic preservation). But see United Artists Theater Circuit v City of Philadelphia (1991) 528 Pa 12, 595 A2d 6, revd sub nom United Artists' Theater Circuit v City of Philadelphia, 535 Pa 370, 635 A2d 612 (taking found under the Pennsyl-

vania state constitution).

[FN53] Gardner v New Jersey Pinelands Com. (1991) 125 NJ 193, 593 A2d 251, 22 ELR 20155; Barancik v County of Marin (1988, CA9 Cal) 872 F2d 834, cert den 493 US 894, 107 L Ed 2d 192, 110 S Ct 242 (upholding county plan that restricts housing density to one residence per sixty acres in a valley used for agriculture); Gisler v County of Madera (1974, 5th Dist) 38 Cal App 3d 303, 112 Cal Rptr 919 (upholding ordinance providing for exclusive agricultural use and prohibiting sales of parcels less than eighteen acres); Wilson v County of McHenry (1981, 2d Dist) 92 Ill App 3d 997, 48 Ill Dec 395, 416 NE2d 426 (upholding 160-acre minimum lot size in agricultural zones); Codorus Township v Rodgers (1985) 89 Pa Cmwlth 79, 492 A2d 73 (upholding ordinance prohibiting division of productive farmland into tracts of less than fifty acres);. Glisson v Alachua County (1990, Fla App D1) 558 So 2d 1030, 15 FLW D 187 (development limitations substantially advanced legitimate state interests of protecting environment and preserving historic sites), review den (Fla) 570 So 2d 13040; Orion Corp. v State (1987) 109 Wash 2d 621, 747 P2d 1062, 18 ELR 20697, cert den 486 US 1022, 100 L Ed 2d 227, 108 S Ct 1996 (strict development restrictions on least disturbed estuary on Puget Sound substantially advanced environmental preservation goal); Usdin v State, Dep't of Environmental Protection, Div. of Water Resources (1980) 173 NJ Super 311, 414 A2d 280, affd 179 NJ Super 113, 430 A2d 949, ("No longer are we able to afford the luxury of squandering nature or indiscriminate over-development ....").

[FN54] See, e.g., Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300 (upholding restrictions against removal of coal to prevent mine subsidence); Department of Natural Resources v Indiana Coal Council, Inc. (1989, Ind) 542 NE2d 1000, 108 OGR 240, cert den 493 US 1078, 107 L Ed 2d 1036, 110 S Ct 1130 (declaration by Department of Natural Resources that area was unsuitable for surface coal mining because it would damage important historic and cultural systems substantially related to government purpose of preserving heritage of nation and state); Dock Watch Hollow Quarry Pit, Inc. v Warren (1976) 142 NJ Super 103, 361 A2d 12, affd 74 NJ 312, 377 A2d 1201 (rock quarry); Goldblatt v Hempstead (1962) 369 US 590, 8 L Ed 2d 130, 82 S Ct 987 (upholding ordinance prohibiting excavation within two feet of groundwater level).

[FN55] See, e.g., Bernardsville Quarry, Inc. v Bernardsville (1992) 129 NJ 221, 608 A2d 1377; Vanderburgh County Bd. of Comm'rs v Rittenhouse (1991, Ind App) 575 NE2d 663, transfer den (Feb 14, 1992) (refusal to rezone agricultural land to permit light industrial use did not deny landowners all economically viable use of their property).

[FN56] Lucas v South Carolina Coastal Council (1992, US) 120 L Ed 2d 798, 112 S Ct 2886, 92 Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297; see § 10 for a full discussion of Lucas and limitations on the noxious use exception.

Section 6 Footnotes:

[FN57] Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226; Hodel v Irving (1987) 481 US 704, 713-14, 95 L Ed 2d 668, 107 S Ct 2076; Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300; MacDonald, Sommer & Frates v County of Yolo (1986) 477 US 340, 91 L Ed 2d 285, 106 S Ct 2561, 16 ELR 20807, reh den 478 US 1035, 92 L Ed 2d 773, 107 S Ct 22; Loretto v Teleprompter Manhattan CATV Corp. (1982) 458 US 419, 426, 73 L Ed 2d 868, 102 S Ct 3164, 8 Media L R 1849, on remand 58 NY2d 143, 459 NYS2d 743, 446 NE2d 428, later proceeding (1st Dept) 135 App Div 2d 444, 522 NYS2d 543, app den 71 NY2d 802, 527 NYS2d 768, 522 NE2d 1066 and cert den 488 US 827, 102 L Ed 2d 55, 109 S Ct 78; Kaiser Aetna v United States (1979) 444 US 164, 62 L Ed 2d 332, 100 S Ct 383, 13 Envt Rep Cas 1929, 10 ELR 20042.

[FN58] The court in a takings analysis would address a number of questions; for instance, under the particular facts of a Washington state case, the court deemed the following questions relevant: "(1) the history of the property—when was it purchased? How much land was purchased? Where was the land located? What was the nature of title? What was the composition of the land and how was it initially used?; (2) the history of development —what was built on the property and by whom? How was it subdivided and to whom was it sold? What plats were filed? What roads were dedicated?; (3) the history of zoning and regulation—how and when was the land classified? How was use proscribed? What changes in classifications occurred?; (4) how did development change when title passed?; (5) what is the present nature and extent of the property?; (6) what were the reasonable expectations of the landowner under state common law?; (7) what were the reasonable expectations of the neighboring landowners under state common law?; and (8) perhaps most importantly, what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation? Once such facts are determined, an application of these facts under the Penn Central multifactor inquiry would follow." Reahard v Lee County (1992, CA11 Fla) 968 F2d 1131, 22 ELR 21455, 6 FLW Fed C 991, supp op, remanded (CA11) 978 F2d 1212, 6 FLW Fed C 1371, 23 ELR 20369, appeal after remand, remanded (CA11 Fla) 30 F3d 1412, 8 FLW Fed C 573, cert den (US) 131 L Ed 2d 557.

[FN59] See, e.g., Vatalaro v Department of Environmental Regulation (1992, Fla App D5) 601 So 2d 1223, 17 FLW D 1350, review den (Fla) 613 So 2d 3 (denial of permit for residence and septic tank within wetland area constituted a regulatory taking.).

[FN60] See, e.g., Carabell v Department of Natural Resources (1991) 191 Mich App 610, 478 NW2d 675, app den 439 Mich 980, 483 NW2d 858 (despite denial of permit to build condominium complex, owner was free to submit further applications for development projects that might be approved).

[FN61] See, e.g., Lakeshore Harbor Condominium Dev. v New Orleans (1992, La App 4th Cir) 603 So 2d 192 (rezoning did not constitute a compensable regulatory taking).

[FN62] See, e.g., Vatalaro v Department of Environmental Regulation (1992, Fla App D5) 601 So 2d 1223, 17 FLW D 1350, review den (Fla) 613 So 2d 3.

[FN63] United States v Riverside Bayview Homes, Inc. (1985) 474 US 121, 88 L Ed 2d 419, 106 S Ct 455, 23 Envt Rep Cas 1561, 16 ELR 20086.

[FN64] See, e.g., McElwain v County of Flathead (1991) 248 Mont 231, 811 P2d 1267, cert den 502 US 1030, 116 L Ed 2d 774, 112 S Ct 868 (evidence indicating that landowner could still use property for the purposes originally intended, that of building home in which to retire, although not as near the river as he would have liked.); Dodd v Hood River County (1992) 115 Or App 139, 836 P2d 1373, reconsideration den (Nov 12, 1992) and reconsideration den (Nov 12, 1992) and review gr 315 Or 271, 844 P2d 206 and review gr 315 Or 271, 844 P2d 206 and affd 317 Or 172, 855 P2d 608 (denial of conditional use permit to build single family dwelling in forestry zone not a taking since regulation did not deny landowner substantial beneficial use of property).

Section 7 Footnotes:

[FN65] Pennsylvania Coal Co. v Mahon (1922) 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321.

[FN66] See, e.g., Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226 (diminution in value of the property from $75,000 to $25,000 failed to meet the constitutional standard of loss of economically

viable use).

[FN67] McNulty v Indialantic (1989, MD Fla) 727 F Supp 604, 20 ELR 20636.

[FN68] See, e.g., Loveladies Harbor, Inc. v United States (1990) 21 Cl Ct 153, 31 Envt Rep Cas 1847, 20 ELR 21207 and motion den, remanded (CA FC) 27 F3d 1545, 24 ELR 20938 and affd (CA FC) 28 F3d 1171, 38 Envt Rep Cas 1867, 24 ELR 21072, reh, en banc, den (CA FC) 1994 US App LEXIS 28462 (the value of the owner's property had been virtually eradicated as a result of government action. The value of the property before the taking was $2,658,000; the value of the property after permit denial was $12,500, resulting in a diminution in value of over 99 percent.); The US Supreme Court in its Lucas decision also suggested that the owner might prevail when the value of its property had been substantially diminished. In taking issue with Justice Stevens' dissent in Lucas, the Court wrote: "JUSTICE STEVENS criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[the] landowner whose property is diminished in value 95 percent recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and ... the extent to which the regulation has interfered with distinc t investment-backed expectations" are keenly relevant to takings analysis generally. Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226. It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations. 112 SCt at 2895 n. 8 (citation omitted).

Section 8 Footnotes:

[FN69] Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226.

[FN70] See § 7.

[FN71] Lucas v South Carolina Coastal Council (1992, US) 120 L Ed 2d 798, 112 S Ct 2886, 92 Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297.

[FN72] See, e.g., Littman v Gimello (1989) 115 NJ 154, 557 A2d 314, cert den 493 US 934, 107 L Ed 2d 314, 110 S Ct 324 (designation of plaintiff's property as a hazardous waste facility resulting in "lost economic opportunities, foregone financing, and diminution in market value arising from government plans, and their attendant publicity do not alone give rise to a compensable taking").

[FN73] See Fragopoulos v Rent Control Bd. (1990) 408 Mass 302, 557 NE2d 1153 (criticized on other grounds by Opinion of Justices to House of Representatives, 408 Mass 1215, 563 NE2d 203).

[FN74] Steinbergh v Cambridge (1992) 413 Mass 736, 604 NE2d 1269, cert den (US) 124 L Ed 2d 249, 113 S Ct 2338, 21 M.L.W. 2814.

[FN75] See, e.g., Manor Dev. Corp. v Conservation Com. of Simsbury (1980) 180 Conn 692, 433 A2d 999,

12 ELR 20063.

[FN76] See, e.g., Gil v Inland Wetlands & Watercourses Agency (1991) 219 Conn 404, 593 A2d 1368.

[FN77] Lone v Montgomery County (1991) 85 Md App 477, 584 A2d 142 (10 year amortization period for changing nonconforming multifamily housing to single-family housing not a taking); Naegele Outdoor Advertising v Durham (1992, MD NC) 803 F Supp 1068, affd without op (CA4 NC) 19 F3d 11, reported in full (CA4 NC) 1994 US App LEXIS 3531 and cert den (US) 130 L Ed 2d 278, 115 S Ct 317 (ordinance with five and one-half year amortization period for all commercial and off-premises advertising signs did not constitute a regulatory taking); Sullivan v Zoning Bd. of Adjustment (1984) 83 Pa Cmwlth 228, 478 A2d 912 ("Each case in this class must be determined on its own facts; and the answer to the question of whether the provision is reasonable must be decided by observing its impact upon the property under consideration. The true issue is that of whether, considering the nature of the present use, the length of the period for amortization, the present characteristics of and the foreseeable future prospects for development of the vicinage and other relevant facts and circumstances, the beneficial effects upon the community that would result from the discontinuance of the use can be seen to more than offset the losses to the affected landowner.").

[FN78] Lachapelle v Goffstown (1967) 107 NH 485, 225 A2d 624, 22 ALR3d 1128.

[FN79] See Gurnee v Miller (1966, 2d Dist) 69 Ill App 2d 248, 215 NE2d 829; Eutaw Enterprises, Inc. v Baltimore (1966) 241 Md 686, 217 A2d 348; Los Angeles v Gage (1954) 127 Cal App 2d 442, 274 P2d 34; Grant v Baltimore (1957) 212 Md 301, 129 A2d 363.

[FN80] Pennsylvania Northwestern Distribs. v Zoning Hearing Bd. (1991) 526 Pa 186, 584 A2d 1372, 8 ALR5th 970. Chief Justice Nix concurred in the result, however, rejected the categorical rule adopted by the court, stating: "I believe that a per se prohibition against amortization provisions is too restrictive.")

Section 9 Footnotes:

[FN81] Penn Cent. Transp. Co. v New York City (1978) 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, 11 Envt Rep Cas 1801, 8 ELR 20528, reh den 439 US 883, 58 L Ed 2d 198, 99 S Ct 226.

[FN82] 438 US at 124.

[FN83] 438 US at 124.

[FN84] 438 US at 125.

[FN85] Id.

[FN86] Id. at 133.

[FN87] Id. at 134. This theme is repeated in Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300, wherein the court considers "reciprocity of advantage" with regard to the burdens and benefits of a challenged regulation. "Under our system of government, one of the State's primary ways of preserving public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are 'properly treated as part of the burden of common citizenship.'" 480 US at 491 (citations omitted).

[FN88] Agins v Tiburon (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138, 14 Envt Rep Cas 1555, 10 ELR 20361.

[FN89] 447 US at 262.

[FN90] Fitzgarrald v Iowa City (1992, Iowa) 492 NW2d 659, cert den (US) 124 L Ed 2d 253, 113 S Ct 2343.

[FN91] See, e.g., Tamm v Burns (1992) 222 Conn 280, 610 A2d 590 (state Commissioner of Transportation's removal of trees from adjacent state property exposed plaintiff's property to unsightliness, noise and noxious fumes).

[FN92] Yee v City of Escondido (1990, 4th Dist) 224 Cal App 3d 1349, 274 Cal Rptr 551, review den (Cal) 1991 Cal LEXIS 353 and cert gr, in part 502 US 905, 116 L Ed 2d 239, 112 S Ct 294, motion den 502 US 966, 116 L Ed 2d 455, 112 S Ct 435, argued (Jan 22, 1992) and affd 503 US 519, 118 L Ed 2d 153, 112 S Ct 1522, 92 CDOS 2757, 92 Daily Journal DAR 4358, 6 FLW Fed S 158; Sandpiper Mobile Village v City of Carpinteria (1992, 2nd Dist) 10 Cal App 4th 542, 12 Cal Rptr 2d 623, 92 CDOS 8579, 92 Daily Journal DAR 14162, and review den, (Cal) 1993 Cal LEXIS 729 and cert den (US) 123 L Ed 2d 473, 113 S Ct 1850; Greene v Mirabel (1987, 1st Dept) 129 App Div 2d 1018, 513 NYS2d 905, app den 70 NY2d 608, 521 NYS2d 225, 515 NE2d 910 and app dismd 485 US 983, 99 L Ed 2d 494, 108 S Ct 1284. But see Seawall Associates v New York (1989) 74 NY2d 92, 544 NYS2d 542, 542 NE2d 1059, later proceeding 492 US 935, 106 L Ed 2d 632, 110 S Ct 18 and cert den 493 US 976, 107 L Ed 2d 503, 110 S Ct 500 (municipal law establishing 5 year moratorium on conversion, alteration and demolition of single-room occupancy housing and requiring owners to restore all units to habitable condition and lease them at controlled rents for indefinite period constituted physical taking of private property without just compensation).

[FN93] Lucas v South Carolina Coastal Council (1992, US) 120 L Ed 2d 798, 112 S Ct 2886, 92 Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297; see also Fitzgarrald v Iowa City (1992, Iowa) 492 NW2d 659, cert den (US) 124 L Ed 2d 253, 113 S Ct 2343 (if some physical invasion is demonstrated there is no de minimis rule).

Section 10 Footnotes:

[FN94] See, e.g., McNulty v Indialantic (1989, MD Fla) 727 F Supp 604, 20 ELR 20636, rejecting a landowner's contention that a setback requirement on oceanfront property worked a taking because "the government can destroy all economic use if necessary to avoid a public nuisance or nuisance-like use." 727 F Supp at 609; Presbytery of Seattle v King County (1990) 114 Wash 2d 320, 787 P2d 907, 21 ELR 21010, cert den 498 US 911, 112 L Ed 2d 238, 111 S Ct 284, holding that if a regulation protects the public from harm, and does not infringe on the landowner's right to possess, exclude others and dispose of his property, no taking has occurred; Claridge v New Hampshire Wetlands Bd. (1984) 125 NH 745, 485 A2d 287, 22 Envt Rep Cas 1208, where the court upheld the denial of permit to fill tidal wetlands, thereby rendering the property of negligible economic value, based on a harm prevention rationale that the regulation prevented destruction to the coastal habitat that would pose a further risk to the public welfare. And see Candlestick Properties, Inc. v San Francisco Bay Conservation & Dev. Com. (1973, 1st Dist) 11 Cal App 3d 557, 89 Cal Rptr 897, 3 ELR 20446. But see Annicelli v South Kingstown (1983, RI) 463 A2d 133, finding improper exercise of the town's police power in enacting a zoning ordinance restricting shoreline development in order to mitigate flood dangers and to protect offshore barrier beaches. Despite the recognition of the ecological importance of barrier beaches, the court ruled that "ecological or environmental legislation may constitute a taking when all beneficial use of the property is denied ... to benefit the public welfare." In this case the regulation was more aimed at furthering a public good than preventing a public harm.

[FN95] Mugler v Kansas (1887) 123 US 623, 668-69, 31 L Ed 205, 8 S Ct 273. Accord Allied-General Nuclear Services v United States (1988, CA FC) 839 F2d 1572, companion case (CA FC) 839 F2d 1578, cert den 488 US 820, 102 L Ed 2d 41, 109 S Ct 63 and cert den 488 US 819, 102 L Ed 2d 39, 109 S Ct 61. Cf. Department of Agriculture & Consumer Services v Mid-Florida Growers, Inc. (1988, Fla) 521 So 2d 101, 13 FLW 40, cert den 488 US 870, 102 L Ed 2d 149, 109 S Ct 180, later proceeding (Fla App D2) 532 So 2d 1294, 13 FLW 2377, later proceeding (Fla App D2) 535 So 2d 273, later proceeding (Fla App D2) 541 So 2d 1243, 14 FLW 650, companion case (Fla App D2) 541 So 2d 1252, 14 FLW 826 and remanded (Fla) 570 So 2d 892, 15 FLW S 493 (even though state validly exercised police power in conformity with applicable statutes when it destroyed healthy orange trees to prevent spread of citrus canker disease, its exercise of the police power still resulted in a taking).

[FN96] Lucas v South Carolina Coastal Council (1992, US) 120 L Ed 2d 798, 112 S Ct 2886, 92 Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297.

[FN97] Lucas, 112 S Ct at 2893.

[FN98] Id.; see also Loretto v Teleprompter Manhattan CATV Corp. (1982) 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164, 8 Media L R 1849, on remand 58 NY2d 143, 459 NYS2d 743, 446 NE2d 428, later proceeding (1st Dept) 135 App Div 2d 444, 522 NYS2d 543, app den 71 NY2d 802, 527 NYS2d 768, 522 NE2d 1066 and cert den 488 US 827, 102 L Ed 2d 55, 109 S Ct 78.

[FN99] Lucas, 112 S Ct at 2893 (citing Agins v Tiburon (1980) 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138, 14 Envt Rep Cas 1555, 10 ELR 20361); see also Nollan v California Coastal Com. (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141, 26 Envt Rep Cas 1073, 17 ELR 20918; Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 495, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300; Hodel v Virginia Surface Mining & Reclamation Asso. (1981) 452 US 264, 295–96, 69 L Ed 2d 1, 101 S Ct 2352, 16 Envt Rep Cas 1027, 11 ELR 20569.

[FN1] SC Code Ann §§ 48-39-10 et seq.

[FN2] Lucas v South Carolina Coastal Council (1991) 304 SC 376, 404 SE2d 895, 899, 21 ELR 20837, cert gr 502 US 966, 116 L Ed 2d 455, 112 S Ct 436, motion gr (US) 119 L Ed 2d 561, 112 S Ct 2935 and revd (US) 120 L Ed 2d 798, 112 S Ct 2886, 92 Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297.

[FN3] Keystone Bituminous Coal Ass'n v DeBenedictis (1987) 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232, 25 Envt Rep Cas 1649, 93 OGR 300. In Keystone, the Supreme Court majority again approved the Mugler rule that, in some cases, no compensation is due regardless of the remaining worth of the property after regulation. Specifically, the Keystone Court noted that "long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" Keystone, 480 US 491–92, quoting Mugler v Kansas (1887) 123 US 623, 31 L Ed 205, 8 S Ct 273.

[FN4] Lucas v South Carolina Coastal Council (1992, US) 120 L Ed 2d 798, 112 S Ct 2886, 2901, 92 Daily Journal DAR 9030, 34 Envt Rep Cas 1897, 22 ELR 21104, 6 FLW Fed S 715, on remand, remanded 309 SC 424, 424 SE2d 484, 23 ELR 20297.

[FN5] Id. See also Powers v Skagit County (1992) 67 Wash App 180, 835 P2d 230, for a well-presented discussion of this new standard.

[FN6] Lucas, 112 S Ct at 2899.

Section 11 Footnotes:

[FN7] Nollan v California Coastal Com. (1987) 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141, 26 Envt Rep Cas 1073, 17 ELR 20918.

[FN8] 483 US at 834–835.

[FN9] 483 US at 837: "Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."

[FN10] See 483 US at 837.

[FN11] See also Surfside Colony, Ltd. v California Coastal Com. (1991, 4th Dist) 226 Cal App 3d 1260, 277 Cal Rptr 371, 91 CDOS 575, 91 Daily Journal DAR 767, reh den (Cal App 4th Dist) 91 CDOS 1364, 91 Daily Journal DAR 1996 (no nexus between public access requirement as condition for construction and regulation aimed at preventing beach erosion); cf. McNulty v Indialantic (1989, MD Fla) 727 F Supp 604, 20 ELR 20636 (ordinance setback requirements had sufficient nexus with objective of controlling beach erosion).

[FN12] The Court described this requirement: "[A] permit condition that serves the same legitimate [governmental] purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.... The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.... In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." Nollan v California Coastal Comm'n, 483 US at 836–37 (1987).

[FN13] Such as in Nollan, where the California Coastal Commission sought to condition a building permit on the granting of a public easement across the Nollan's beachfront property.

[FN14] See, e.g., Blue Jeans Equities West v City and County of San Francisco (1992, 1st Dist) 3 Cal App 4th 164, 4 Cal Rptr 2d 114, 92 CDOS 983, 92 Daily Journal DAR 1557, review den (Cal) 1992 Cal LEXIS 2234 and cert den (US) 121 L Ed 2d 135, 113 S Ct 191 (traffic impact fee constituted reasonable condition for issuance of building permit).

Section 12 Footnotes:

[FN15] First English Evangelical Lutheran Church v County of Los Angeles (1987) 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378, 26 Envt Rep Cas 1001, 17 ELR 20787.

[FN16] 482 US at 321.

[FN17] 482 US at 310.

[FN18] See, e.g., Guinnane v City and County of San Francisco (1987, 1st Dist) 197 Cal App 3d 862, 241 Cal

Rptr 787, cert den 488 US 823, 102 L Ed 2d 47, 109 S Ct 70, later proceeding (1st Dist) 209 Cal App 3d 732, 257 Cal Rptr 742, review den (Cal) 1989 Cal LEXIS 3657 and cert den 493 US 936, 107 L Ed 2d 319, 110 S Ct 329.

[FN19] See, e.g., McCutchan Estates Corp. v Evansville-Vanderburgh County Airport Authority Dist. (1991, Ind App) 580 NE2d 339 ("[T]here is nothing in First English which alters the established principle that the interim burden imposed on a landowner during the government's decisionmaking process, absent unreasonable delay, does not constitute a taking.").

[FN20] See, e.g., Woodbury Place Partners v Woodbury (1992, Minn App) 492 NW2d 258, review den (Minn) 1993 Minn LEXIS 20 and cert den (US) 124 L Ed 2d 679, 113 S Ct 2929 (two year development moratorium was not a taking); cf. Lucas v South Carolina Coastal Council (1992) 309 SC 424, 424 SE2d 484, 23 ELR 20297 (on remand from US Supreme Court, South Carolina Supreme Court found state Beachfront Management Act caused temporary regulatory taking of landowner's property).

[FN21] See, e.g., Smith v Wolfeboro (1992) 136 NH 337, 615 A2d 1252 (erroneous planning board decision on subdivision application did not amount to temporary regulatory taking; sole remedy is appeal of decision, and any decrease in value of property during the pendency of the appeal must be borne by the owner as one of the incidents of ownership.); Wilson v Commonwealth (1992) 413 Mass 352, 597 NE2d 43 (destruction of property by natural forces while administrative procedure is following its normal, reasonable course, did not provide basis for regulatory taking claim); McCutchan Estates Corp. v Evansville-Vanderburgh County Airport Authority Dist. (1991, Ind App) 580 NE2d 339 (administrative delay of nine months in processing subdivision approvals did not constitute a temporary taking).

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